Docket for 02-954

No. 02-954 Status: GRANTED
Title: Office of Independent Counsel, Petitioner
v.
Allan J. Favish, et al.
Docketed: December 20, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-55487/55788/55789)
Decision Date: June 6, 2002
Rehearing Denied: August 16, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 4 2002	Application (02A370) to extend the time to file a petition for a writ of certiorari from November 14, 2002 to December 14, 2002, submitted to Justice O'Connor.
Nov 5 2002	Application (02A370) granted by Justice O'Connor extending the time to file until December 16, 2002.
Dec 4 2002	Application (02A370) to extend further the time to file a writ of certiorari from December 14, 2002 to December 20, 2002, submitted to Justice O'Connor.
Dec 4 2002	Application (02A370) granted by Justice O'Connor extending the time to file until December 20, 2002.
Dec 20 2002	Petition for writ of certiorari filed. (Response due January 21, 2003)
Jan 2 2003	Waiver of right of respondent Allan J. Favish to respond filed.
Jan 21 2003	Brief of respondents Sheila Foster Anthony and Lisa Foster Moody filed.
Feb 19 2003	Response Requested . (Due March 21, 2003)
Mar 5 2003	Application (02A755) to file a brief in opposition in excess of page limits, submitted to Justice O'Connor.
Mar 11 2003	Application (02A755) denied by Justice O'Connor.
Mar 21 2003	Response to petition from respondent Allan J. Favish filed.
Apr 4 2003	Reply of petitioner Office of Independent Counsel filed.
May 5 2003	Petition GRANTED.
Jun 11 2003	Extension of time within which to file petitioner's brief on the merits to and including July 18, 2003.
Jul 16 2003	Motion for leave to file amicus brief filed by Teresa Earnhardt.
Jul 18 2003	Brief of respondents Sheila Foster Anthony and Lisa Foster Moody in support of the petitioner filed.
Jul 18 2003	Joint appendix filed.
Jul 18 2003	Brief of petitioner Office of Independent Counsel filed.
Jul 23 2003	Motion for divided arguement filed by petitioner Office of Independent Counsel.
Aug 6 2003	Brief of respondent Allan J. Favish filed.
Aug 18 2003	Brief amici curiae of Association of American Physicians & Surgeons, Inc., et al. filed.
Aug 21 2003	Motion for leave to participate in oral argument as amici curiae and for divided argument filed by Reporters Committee for Freedom of the Press, et al.
Aug 21 2003	Brief amicus curiae of Silha Center for the Study of Media Ethics and Law filed.
Aug 22 2003	Brief amicus curiae of Reporters Committee for Freedom of the Press, et al., filed.
Aug 25 2003	Motion for divided argument filed by petitioner GRANTED.

Aug 25 2003	Application (03A159) to extend the time to file petitioner's reply brief on the merits from September 10, 2003 to September 24, 2003, submitted to Justice O'Connor.
Aug 25 2003	Motion for leave to file amicus brief filed by Teresa Earnhardt GRANTED.
Aug 27 2003	Application (03A159) granted by Justice O'Connor extending the time to file petitioner's reply brief on the merits until September 24, 2003.
Aug 27 2003	Application (03A174) of respondents Foster, et al., in support of petitioner, to extend the time to file a reply brief on the merits from September 10, 2003 to September 24, 2003, submitted to Justice O'Connor.
Aug 27 2003	Application (03A174) granted by Justice O'Connor extending the time to file until September 24, 2003.
Sep 24 2003	Reply of respondents Sheila Foster Anthony and List Foster Moody filed.
Sep 24 2003	SET FOR ARGUMENT Wednesday, December 3, 2003.
Sep 24 2003	Reply of petitioner Office of Independent Counsel filed.
Oct 3 2003	CIRCULATED.
Oct 6 2003	Motion for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Oct 22 2003	Record received from the U.S.C.A. for the Ninth Circuit. (1 envelope; 1 envelope sealed)
Oct 23 2003	Record received from the U.S.D.C. for the Central District of California. (1 box - a portion of record is sealed)

Supreme Court, U.S.
FILED

02 954 DEC 20 2002

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The question presented is:

Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs relating to the death of former Deputy White House Counsel Vincent Foster.

PARTIES TO THE PROCEEDING

The respondents are Allan Favish, who was the plaintiff below, and Sheila Foster Anthony and Lisa Foster Moody, who intervened in the court of appeals to join petitioner in defending the district court's judgment, and who have filed their own petition for a writ of certiorari in this case, *Sheila Foster Anthony, et al.* v. *Favish*, No. 02-599.

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In the Supreme Court of the United States

No.

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Office of Independent Counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The per curiam order of the court of appeals (App., *infra*, 1a-3a) is not published in the *Federal Reporter*, but it is *reprinted at* 37 Fed. Appx. 863. A prior opinion of the court of appeals in this case (App., *infra*, 4a-43a) is reported at 217 F.3d 1168. The orders of the district court (App., *infra*, 44a-46a, 47a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. The government's petition for rehearing was denied on August 16, 2002. App., *infra*, 63a-64a. On November 5, 2002, Justice O'Connor extended the time

within which to file a petition for a writ of certiorari to December 14, 2002, and, on December 4, 2002, Justice O'Connor further extended the time for filing a petition to and including December 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Freedom of Information Act, 5 U.S.C. 552(b)(7), is set forth at App., *infra*, 65a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552, Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action of Haw.*, 454 U.S. 139, 144 (1981). To that end, FOIA Exemption 7(C) exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. This FOIA suit arises from the July 1993 suicide of Deputy White House Counsel Vincent Foster. Foster was found dead in Fort Marcy Park in McLean, Virginia. The United States Park Police conducted the initial investigation of Foster's death at Fort Marcy Park and took color photographs, including ten pictures of Foster's body. Investigations by the Park Police, the FBI, and congressional committees in both the House of Representatives and the Senate concluded that Foster committed suicide. App., *infra*, 5a. The Office of Independent Counsel twice investigated Foster's death, first through Independent Counsel Robert Fiske, Jr., and later through Independent Counsel

Kenneth Starr. *Id.* at 5a, 26a-28a. Mr. Fiske issued a 58-page report concluding that the "overwhelming weight of the evidence compels the conclusion * * * that Vincent Foster committed suicide." *Id.* at 26a. Three years later, Mr. Starr filed a 114-page report that concurred with the conclusion of every other investigation, explaining that "[t]he available evidence points clearly to suicide as the manner of death." *Id.* at 28a.

3. A public-interest group, Accuracy in Media, filed a request with the Park Police seeking the autopsy photographs and photographs of Foster's body at Fort Marcy Park. The government declined to provide the photographs. The Court of Appeals for the District of Columbia Circuit sustained that decision, holding that the photographs are exempt from mandatory disclosure under FOIA Exemption 7(C). *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000). The D.C. Circuit noted that Accuracy in Media's asserted public interest in disclosure was to uncover "government foul play" in the investigations into Foster's death. *Id.* at 124. Adhering to circuit precedent, the court held that, to establish that the resulting invasion of privacy would not be "unwarranted" under Exemption 7(C) in these circumstances, Accuracy in Media must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photographs] is necessary in order to confirm or refute that evidence." *Ibid.* (quoting *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991)). The D.C. Circuit concluded that "there is no persuasive evidence of such falsification, much less compelling evidence," and it determined that unsubstantiated allegations of governmental misconduct alone are insuffi-

cient to overcome the surviving family members' privacy interest under Exemption 7(C). *Ibid.*

4. a. Respondent, who was an attorney for Accuracy in Media in the D.C. Circuit case, filed his own FOIA request for the ten photographs, seeking them from the Office of Independent Counsel. The Office withheld them under Exemption 7(C). Respondent filed suit in the Central District of California. The district court sustained the government's invocation of Exemption 7(C). The district court explained that the public interest asserted by Favish— that of "ensuring that the [Office of Independent Counsel] conducted a proper and thorough investigation," App., *infra*, 58a—"is lessened because of the exhaustive investigation that has already occurred regarding Foster's death," *ibid.* The district court further held that Favish failed to "sufficiently explain[] how the disclosure of these photographs will illuminate any deficiencies of the [Office of Independent Counsel] investigation." *Id.* at 59a. The district court thus concluded that the family's privacy interest outweighed the public interest in disclosure. *Ibid.*

b. A divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded the case. App., *infra*, 4a-43a. The court first agreed with every other circuit court to address the question that "the personal privacy in the statutory exemption [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at 13a. With respect to the public interest in disclosure necessary to overcome that privacy interest, however, the majority departed from the approach taken by the D.C. Circuit. While the D.C. Circuit had required, with respect to these same photographs, a showing of compelling evidence (not mere allegations) of governmental

misconduct to outweigh the family's privacy interest, *Accuracy in Media*, 194 F.3d at 124, the Ninth Circuit held that it was sufficient that Favish simply sought to probe "how the [Office of Independent Counsel] conducted its investigation of Foster's death," because Favish thus sought to examine "what [his] government is up to." App., *infra*, 10a. Evidence or knowledge of "misfeasance by the agency," the court concluded, is not necessary, regardless of how many "other agencies have engaged in similar investigations" already. *Id.* at 11a. The court then remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Id.* at 14a.

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, App., *infra*, 14a, but filed a lengthy dissent disagreeing with the majority's remand of the case and its analysis of the public interest in disclosure, *id.* at 14a-43a. He reasoned that the government's *Vaughn* index[1] was sufficiently detailed to make a remand for *in camera* review of the photographs unnecessary, *id.* at 18a-22a, and that the "pain and anguish" that petitioner concedes the Foster family would suffer, *id.* at 35a, outweighs the public interest in obtaining the photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 38a-42a. Furthermore, Judge Pregerson explained that, although Favish alleges that the investigation was "'grossly incomplete and untrustworthy,'" *id.* at 38a, Favish "has made no showing that anyone connected

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[1] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

with the [Office of Independent Counsel]'s investigations—including Mr. Starr—engaged in wrongful conduct, [or] failed in his or her official duties." *Ibid.* Finally, like the district court, Judge Pregerson could find no nexus between disclosure of the photographs and advancement of the asserted public interest, because Favish failed to demonstrate that the "photographs at issue will shed any light on the integrity of their investigations, the nature of the [Office of Independent Counsel]'s conduct, or the correctness of its conclusions." *Ibid.*

c. On remand, the district court ordered release of five of the ten photographs. App., *infra*, 44a-46a. Those five included one photograph of a gun in Foster's hand that had been published previously by *Time* magazine. *Id.* at 13a.

d. The government appealed, and the widow and sister of Vincent Foster (who are petitioners in No. 02-599) intervened on appeal. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. App., *infra*, 1a-2a. The court held, however, that one photograph ordered released by the district court had been properly withheld by the Office of Independent Counsel. *Id.* at 2a. The four photographs ordered released included the one previously published by *Time* magazine, which shows Foster's right hand holding the gun, two photographs of Foster's right shoulder and the right side of his torso, and one photograph of the top of Foster's head from a distance through heavy foliage. *Id.* at 45a-46a. None of the photographs depict Foster's face or the bullet wounds.

Judge Pregerson again dissented on the ground that the nine "never-before-released" photographs were

properly withheld under Exemption 7(C). App., *infra*, 3a.[2] The court of appeals' denied the government's and the Foster family's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing. *Id.* at 63a-64a.

REASONS FOR GRANTING THE PETITION

This case warrants an exercise of this Court's certiorari jurisdiction. A request for the same documents under the Freedom of Information Act has been resolved differently by the District of Columbia and the Ninth Circuits, based on different rules for analyzing the public interest side of the Exemption 7(C) balance. Nevertheless, because this Court has granted certiorari in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms [ATF]* v. *City of Chicago*, cert. granted, No. 02-322 (Nov. 12, 2002), which also involves an analysis of the public interest under Exemption 7(C) and how it should be weighed against the privacy interest in material withheld under that Exemption, the government suggests that the Court hold this petition pending the Court's decision in *ATF* v. *City of Chicago* and then dispose of it as appropriate in light of the decision in that case.

1. By its terms, Exemption 7(C) protects from disclosure law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). There is no dispute that the photographs at issue here are law enforcement records. They were taken by law enforcement officials at the scene where a deceased gun-shot victim was found for the purpose of

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[2] Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. App., *infra*, 3a.

investigating the cause of death. In *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), this Court held that the application of Exemption 7(C) requires courts to weigh the public interest in the documents against the intrusion on privacy that disclosure could be expected to cause.

On the privacy side of the Exemption 7(C) balance, the Ninth Circuit properly ruled—consistent with all other circuits to address the question—that Exemption 7(C) protects the privacy interests of close surviving family members, as well as the subject of the documents. App., *infra*, 13a. Because of the correctness of that aspect of the court of appeals' ruling and the lack of any circuit conflict on the question, the government has opposed the petition for a writ of certiorari filed by Favish seeking this Court's review of the question whether Exemption 7(C) protects the privacy interests of survivors at all, and therefore whether the Ninth Circuit erred in sustaining the withholding of the other six photographs in this case. See Gov't Br. in Opp., *Favish* v. *Office of Indep. Counsel*, No. 02-409.

The Foster family members have filed their own petition for a writ of certiorari seeking review of the Ninth Circuit's decision insofar as it orders release of the same four photographs that are the subject of this petition. *Anthony* v. *Favish*, No. 02-599. In addition to challenging the Ninth Circuit's evaluation of the public interest in disclosure, the Foster family members also raise an issue concerning the standards for assessing privacy interests of survivors under Exemption 7(C). In its response to that petition, the government argues that the survivors' privacy issue does not warrant plenary review, and suggests that the petition otherwise be held pending this Court's decision in *ATF* v. *City of Chicago*, *supra*.

2. Three aspects of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) do, however, warrant certiorari.

a. The court of appeals' decision ordering the release of four of the photographs squarely conflicts with the decision of the D.C. Circuit exempting the same photographs from disclosure. *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).[3] Moreover, the D.C. and Ninth Circuits applied divergent analyses of the public interest under Exemption 7(C) in this setting, where the only asserted public interest is in uncovering governmental misfeasance. The Ninth Circuit held that evidence or knowledge of "misfeasance by the agency" is not necessary. App., *infra*, 11a. The D.C. Circuit, by contrast, has long held that, in light of the presumption of legitimacy that attaches to governmental actions, compelling evidence is necessary before an allegation of misconduct will provide a basis for ordering disclosure of private information under Exemption 7(C). *Accuracy in Media*, 194 F.3d at 124; *Davis* v. *United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992); *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991); *Senate of the Commonwealth of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R. B. Ginsburg, J.) (a "general interest in getting to the bottom of" an alleged murder conspiracy is "not in itself sufficient to outweigh the privacy concerns") (internal quotation marks omitted). The Fourth Circuit takes the same approach.

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[3] The D.C. Circuit case also included a request for autopsy photographs.

Neely v. *FBI*, 208 F.3d 461, 464 (2000) (public interest is "negligible" in absence of a "compelling allegation of agency corruption or illegality"). See also *KTVY-TV* v. *United States*, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" by government is insufficient to outweigh privacy concerns).

Furthermore, in *Department of State* v. *Ray*, 502 U.S. 164 (1991), this Court explained that unsubstantiated allegations of misconduct will not suffice to overcome the privacy interests of third parties under FOIA:

> We are also unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord Government records and official conduct a presumption of legitimacy.

Id. at 179. The Court explained that such substantiation is necessary because,

> [i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of privacy materials, Government agents would have no defense against requests for production of private information.

Ibid.

While *Ray* indicated that bald allegations of governmental misconduct are insufficient to overcome a privacy interest under FOIA, the Court left open the question of "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure." 502 U.S. at 179. This case acutely illustrates the conflict in legal standards adopted by the Ninth Circuit and the D.C. and Fourth Circuits to resolve that question, because the same FOIA request has been adjudicated differently in the two circuits.[4]

b. *Reporters Committee* made clear that the relevant public interest, for purposes of Exemption 7(C), is the extent to which disclosure of the requested documents would "contribute significantly to public understanding of the operations or activities of the government." 489 U.S. at 775. That is "the only relevant public interest." *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994); see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). Accordingly, courts of appeals applying *Reporters Committee* have held that, no matter how meritorious the asserted public interest, disclosure will not be ordered unless the requested documents would actually advance that public interest. See, *e.g.*, *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992) ("the person requesting the information must identify with reasonable specificity the public interest that would be served by release"), overruled on other grounds, 509 U.S. 918 (1993); *Senate of the Commonwealth*, 823 F.2d at 588 ("[T]he Senate has not adequately supported its 'public interest' claim with

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[4] A similar issue under FOIA Exemption 7(C), concerning the assessment of the public interest based on allegations of agency misconduct, is presented in *Oguaju* v. *United States Marshals Service*, petition for cert. pending, No. 02- 5651. In its response to the petition in *Oguaju*, the government suggests that that petition also be held pending the Court's decisions in *ATF* v. *City of Chicago*.

respect to the specific information being withheld. The district court, evaluating the DOJ's (7)(C) claims, must 'weigh[ ] the specific privacy invasion against the value of disclosing a given document.'"). Favish has made no such showing here.

Favish has asserted a generalized public interest in uncovering deficiencies in the Office of Independent Counsel's investigation. In particular, Favish asserts that he needs the photographs to investigate his allegations of a government-wide conspiracy to cover-up the "murder" of Foster. As Judge Pregerson explained in dissent (App., *infra*, 39a-40a), Favish identified four areas of the investigation in which he alleges the Office of Independent Counsel's (and the four other investigations) fell short.[5] The first three areas of the investigation Favish cited concerned which "officials were present during Vincent Foster's autopsy," "witness identifications of Mr. Foster's car in Fort Marcy Park at the time of his death," and "possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow." *Id.* at 39a. The ordered release of photographs of Foster's right shoulder, arm, and torso taken at Fort Marcy Park, however, have no relevance to and can shed no light on which persons were present at the Park or the subsequent autopsy of Foster, or on the appearance of Foster's abandoned car in the parking lot some distance from where Foster's body was found. Only one of the four photographs the court of appeals ordered released depicts the gun in Foster's hand. That same photograph, however, was previously published by *Time* magazine, and "[m]any of the 119

[5] The majority opinion failed to address the nexus problem raised by Judge Pregerson and the district court, App., *infra*, 59a.

photographs already released to Mr. Favish depict the gun that was found at the scene." *Id.* at 39a-40a. Favish made no showing, and the court of appeals offered no explanation, of how such a redundant disclosure could materially advance the public interest.

The remaining aspect of the investigation that Favish identified concerned alleged inconsistencies in the description of the entrance and exit wounds—specifically, whether the wounds were in Foster's head or neck. App., *infra*, 40a-41a. But the photographs that the court of appeals ordered released, by their description in the district court opinion based on the government's *Vaughn* index, do not show any part of Foster's head or neck or any aspect of the bullet wound or the bullet's path. They are pictures "focusing on Rt. side shoulder/arm"; "Right hand showing gun & thumb in guard," which hand was positioned next to Foster's hip; "focusing on right side and arm"; and the "top of head thru heavy foliage." App., *infra*, 45a-46a. Having reviewed the pictures *in camera*, both the district court and the court of appeals were fully apprised that those photographs would do nothing to facilitate Favish's inquiry into the bullet's trajectory. Indeed, the district court, summarily affirmed by the court of appeals, could say nothing more than that the photographs "may be probative of the public's right to know," *id.* at 45a.

FOIA, however, does not give the public a generalized "right to know" personal details about private third parties that happen to be maintained in government files. Such information may be disclosed only if it would directly advance the public's knowledge of the *government's* activities and operations, and if the value

of that knowledge outweighs the intrusion on third-party privacy:

> [A]lthough there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

Reporters Comm., 489 U.S. at 774.

The photographs at issue here reveal nothing about the government's conduct; they reveal only visual depictions relating to the death of Vincent Foster. Moreover, disclosure of those photographs would be entirely ineffectual as a means of advancing Favish's asserted public interest. Favish made no showing that photographs of Foster's torso would facilitate his investigation of Foster's head injuries. Nor did the district court or the court of appeals, in their brief opinions ordering release, identify any such connection. In fact, it is only the photographs that the Ninth Circuit held were *exempt* from mandatory disclosure—the dramatically more graphic shots of Foster's head and face—that bear any potential relation to Favish's asserted interest in studying the bullet's path. Unable to release the only photographs relevant to the purported public interest because of the enormous intrusion on family privacy, however, the court had no equitable license to offset that withholding by ordering the release of different photographs that bear no relationship to advancing the public interest that Favish asserted.

c. The court of appeals also erred in holding that the multiple, lengthy investigations that had already taken place and the enormous volume of materials (including photographs) about Foster's death already in the public domain were completely irrelevant to evaluation of the public interest in disclosure of the particular photographs at issue here.[6] The court of appeals concluded that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations." App., *infra*, 11a. This Court has made clear, however, that the public interest in disclosure of the particular information sought must be measured against the amount of information that is already in the public domain. In *Department of State* v. *Ray*, *supra*, this Court upheld the withholding of the identities of repatriated Haitian refugees who had been interviewed by the State Department on the ground that the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178. Furthermore, in *Reporters Committee*, the Court emphasized that the public interest inquiry asks whether the disclosure of private information would "contribute significantly" to the public's understanding of governmental operations. 489 U.S. at 775. By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which would contribute only marginally, if at all, to public understanding.

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[6] Each Independent Counsel published lengthy reports; the Justice Department has released over one hundred photographs and hundreds of pages of material; and both congressional committees published reports along with volumes of evidence.

The court of appeals' decision also conflicts with the decisions of other circuits, which have hewed to *Ray* and *Reporters Committee*. See, *e.g.*, *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) ("Undoubtedly, the public has an interest in learning about the nature, scope, and results of the [Veterans' Administration]'s investigation of, and its relationship with, one of its contractors. That interest, however, has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned. Disclosure of the identities of the individual suspects employed by Santa Fe, and the identities of others unrelated to the investigation, will add little to the public's understanding of 'what [its] government is up to.'"); *id.* at 324 n.13; *Marzen* v. *Department of Health & Human Services*, 825 F.2d 1148, 1153-1154 (7th Cir. 1987) ("We agree with the district court that the plaintiff failed to establish a nexus between the release of the medical records and the public debate. While it is true that the circumstances surrounding the life and death of Infant Doe are of substantial public interest, release of the intimate details contained in the medical records would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report are already in the public domain.").[7]

[7] See also *Bast* v. *United States Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("While these are important public interests, we note that they have been served to a large extent by the substantial release of information already made in this case. Thus, it is the incremental advantage to the public of releasing the undisclosed portions of the twelve documents which must be weighed against the invasion of personal privacy."); *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981) (per curiam) ("[T]he substance of the information in the FBI files has been exposed in its entirety, and only the names of the FBI agents deleted. * * * The documents thus reveal the entire course of the investigation and the facts it uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation. We find any public interest in pursuing the completeness and adequacy of the investigation beyond this point to be minimal in the extreme."), cert. denied, 456 U.S. 960 (1982); *Stone* v. *FBI*, 727 F. Supp. 662, 666 (D.D.C.), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990); cf. *Cooper Cameron Corp.* v. *United States Dep't of Labor*, 280 F.3d 539, 549 (5th Cir. 2002) (describing Favish's asserted public interest as "highly tenuous" in light of the previous investigations).

In this case, when five investigations in different branches of the federal government (including by the Office of Independent Counsel) have uniformly reached the same result, the contribution to public understanding that a *sixth* investigation by an unsatisfied private citizen can make is marginal at best. The court of appeals thus erred in holding (App., *infra*, 11a) that FOIA compels courts to close their eyes to reality and simply accept at face value any asserted interest in additional investigation of already thoroughly probed matters.

The court of appeals relied on "famous cases" in history that "generate controversy, suspicion, and the desire to second guess the authorities." App., *infra*, 11a. But Favish wants a sixth guess, not a second guess, and he seeks that even though four of those prior investigations were undertaken by entities separate from Executive Branch "authorities." Furthermore, the court of appeals' approach overlooks that the inter-

ests of "someone who has spent many years studying every aspect of [a governmental] investigation in great detail * * * and the public interest are not necessarily identical." *Stone* v. *FBI*, 727 F. Supp. 662, 667 n.4 (D.D.C.), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). That is because "the same bit of new information considered significant by zealous students of the * * * investigation would be nothing more than minutiae of little or no value in terms of the public interest." *Ibid.* (upholding withholding of information pertaining to the Robert F. Kennedy assassination). Accordingly, Exemption 7(C) requires balancing the interest of the general public in disclosure, not the "highly-specialized interests of those individuals who understandably have a great personal stake in gaining access to that information." *Ibid.* In short, while "speculat[ion] and argu[ing]" by the public are always appropriate in a democratic society, "speculation" alone cannot be enough under Exemption 7(C)—regardless of how much has already been disclosed—to outweigh the profound privacy interests of third parties in avoiding disclosure.

3. For the foregoing reasons, the Ninth Circuit erred in its assessment of the public interest in the disclosure of the four photographs of Foster's body that it ordered released in this case, and review by this Court is warranted. The Court, however, has granted review in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms [ATF]* v. *City of Chicago*, cert. granted, No. 02-322 (Nov. 12, 2002), to consider issues concerning the assessment of the public interest in disclosure and the weighing of that interest against privacy interests under Exemption 7(C). Accordingly, plenary review is not warranted in this case at the present time. Instead, the petition should be

held pending the Court's decision in *ATF* v. *City of Chicago*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *City of Chicago*, cert. granted, No. 02-322 (Nov. 12, 2002), and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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DECEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55487
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH, PLAINTIFF–APPELLANT
SHELIA FOSTER ANTHONY, ET AL.,
INTERVENORS-APPELLEES

v.

OFFICE OF INDEPENDENT COUNSEL,
DEFENDANT-APPELLEE

No. 01-55788
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH, PLAINTIFF–APPELLEE
SHELIA FOSTER ANTHONY, ET AL.,
INTERVENORS-APPELLANTS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

No. 01-55789
D.C. No. CV-97-01479-WDK-05

ALLAN J. FAVISH, PLAINTIFF–APPELLEE

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT-
APPELLANT, AND SHEILA FOSTER ANTHONY, ET AL.,
DEFENDANT-INTERVENORS

[Filed: June 6, 2002]

ORDER*

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted May 02, 2002**
San Francisco, California

Before: PREGERSON, NOONAN and O'SCANNLAIN, Circuit Judges.

The order of the district court of January 11, 2001 is AFFIRMED, except that photo 3-VF's body looking down from top of berm is to be withheld.

PREGERSON, Circuit Judge, dissenting:

I continue to maintain that the record before the district court before remand was "sufficiently detailed for the district court to resolve the issues in this case" without an in camera review of the ten photographs at issue. *Favish* v. *OIC*, 217 F.3d 1168, 1186 (9th Cir. 2000). Nevertheless, having personally viewed the ten photographs, I adhere to my prior conclusion that only the photograph of Foster's right hand clutching the gun

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

should be released because "[t]he public's interest in disclosure of the remaining nine, never-before-released post-mortem Polaroid photographs does not outweigh the privacy interests of Vincent Foster's surviving family in their nondisclosure." *Id.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-55594
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF INDEPENDENT COUNSEL,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California; William D. Keller,
District Judge, Presiding

Argued and Submitted: Nov. 1, 1999
Filed: July 12, 2000

Before: PREGERSON, NOONAN and O'SCANNLAIN, Circuit Judges.

Opinion by Judge NOONAN; Partial Concurrence and Partial Dissent by Judge PREGERSON

NOONAN, Circuit Judge:

Allan J. Favish appeals the judgment of the district court granting summary judgment to the Office of Independent Counsel (the OIC) in his action under the Freedom of Information Act, 5 U.S.C. § 552 (1999) (the FOIA). Favish seeks 10 photos relating to the death of

Vincent W. Foster, Jr., the Deputy Counsel to the President. Holding the OIC has not established that the photos fall within the privacy exemption of the FOIA, we reverse the judgment of the district court and remand for further proceedings.

FACTS AND PROCEEDINGS

On July 20, 1993, Foster was found dead in Fort Marcy Park. His death was investigated by the National Park Service and the Federal Bureau of Investigation and by a committee of the House and by a committee of the Senate. *See Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999). It was also investigated twice by the OIC. These inquiries all concluded that Foster committed suicide.

Favish is a lawyer not convinced by the reasoning of these prior investigators and skeptical of the thoroughness of their investigations. On January 6, 1997, he filed his request under the FOIA seeking from the OIC 150 photocopies of photographs compiled for law enforcement purposes. The photos were identified in the request by reference to *Hearings Related to Madison Guaranty S & L and the Whitewater Corporation—Washington, D.C. Phase* United States Senate, 103d Cong. (1994), with the exception of one photo of a gun in Foster's hand, identified as having been published by *Time*, March 18, 1996 and on ABC-TV. Favish sought higher quality copies of these already-published materials and copies of 9 unpublished photos. He offered to pay for the reproduction. On January 24, 1997, the OIC denied his request, stating that the photos were exempt under 5 U.S.C. § 552(b)(7)(A) (records whose "release could reasonably be expected to interfere with enforcement proceedings") and under § 552(b)(7)(C) (relating

to personal privacy). Favish appealed this decision to a higher level of the agency. On February 19, 1997, the OIC denied his appeal, reiterating the exemptions asserted but not explaining how they applied.

On March 6, 1997, Favish filed this suit. On April 28, 1997, the OIC answered making no reference to any exemption and simply denying that Favish was "entitled to the relief sought." On January 5, 1998, the OIC filed a Vaughn index referring to the requested material; at the same time the OIC released 118 copies of the requested photos in black and white. Favish withdrew his request with respect to 21 photos. Eleven photos remained in dispute, as did Favish's request for color versions of the photos released. Both sides moved for summary judgment.

On March 11, 1998 the district court gave summary judgment to Favish as to his request for color photos, to be paid for by Favish, and as to a photo of Foster's eyeglasses. As to the 10 remaining photos, the court balanced the privacy interest of members of the Foster family against the public interest served by new copies of the photos, concluded that the public interest was outweighed by the privacy interest, and gave judgment for the OIC.

Favish appeals.

ANALYSIS

A Preliminary Question. Sua sponte, the court asked whether Favish was collaterally estopped by having been associate counsel for Accuracy in Media, the losing plaintiff in *Accuracy in Media, supra.* In response, arguing for estoppel, the OIC cited decisions of this circuit where privacy [*sic*] leading to estoppel has been found when a party to a judgment virtually

represented "a person now sought to be estopped." Virtual representation, however, has been based on an express or implied legal relationship that makes the party accountable to the person sought to be estopped. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 697 (9th Cir. 1984); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). We have not found a case where a client is accountable to its lawyer. The identity of interest between Favish and Accuracy in Media is "an abstract interest in enforcement" of FOIA, an interest insufficient to create privity. *ITT Rayonier, Inc.*, 627 F.2d at 1003. Collateral estoppel does not apply.

The Command and Purpose of the Statute. The alpha and omega of this case is the statute that prescribes the conditions for the release of records of a public agency when a person makes a request of the agency for a record within its possession. The statute in relevant part reads as follows:

> (a) Each agency shall make available to the public information as follows:
>
> . . . . .
>
> (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3)(A).

Three features of the statutory command are of particular note. The duty to make the information avail-

able to the public is mandatory ("shall make", repeated). The agency response is to be made to *any* request and to *any* person (emphasis supplied). The agency response is to be made promptly (no need for emphasis on this term aimed at the sluggishness all too characteristic of bureaucracies).

The words of a statute are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light "on an agency's performance of its statutory duties." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, 109 S.Ct. 1468, 103 L. Ed. 2d 774 (1989). The statute is a commitment to "the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Id.* (internal quotations omitted). The statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *Id.* at 774.

The Statutory Exemption Invoked. First, the OIC denied Favish's request on one ground that made no sense, viz, that release of the photos would interfere with law enforcement proceedings. It took over a year for the OIC to abandon this position. The bulk of the photos requested were already in the public domain. How higher quality photos released to Favish would interfere with law enforcement was not and has not been explained by an agency under a statutory duty to comply promptly with a freedom of information request.

Second, after the OIC did release new copies of the 118 photos it had withheld without adequate explanation, it did not release them in color, nor did it release a new copy of Foster's eyeglasses. The OIC has now released copies in color and a new copy of the eyeglasses photo, thanks to the order of the district court. Not appealing that order, the OIC tacitly admits that it had no legal right to withhold this material.

Third, in its answer to Favish's complaint, the OIC specifically referred to his request for a new copy of the photo published in *Time*, March 18, 1996 and on ABC-TV and stated that the OIC was "without sufficient information or knowledge to form a belief as to the truth of the allegations" that the photo had been published in the forms alleged. This denial was on its face implausible. How could the OIC not discover, with a modicum of diligence, whether a photo published in national news media had not come from its files? But the OIC did not abandon this posture in the ensuing litigation. In its brief on this appeal, the OIC declared that it did not concede that the photo had come from its files and added that Favish's argument "that the photograph already has been widely disseminated" should, therefore, be rejected. Only on appeal in this court, at oral argument, did counsel for the OIC state that it was true that the OIC possessed the photo referred to in Favish's request.

In the proceedings before the district court, although not in its answer, the OIC invoked this exemption:

> (b) This section does not apply to matters that are
>
> . . . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to con-

stitute an unwarranted invasion of personal privacy.
. . .

5 U.S.C. § 552(b)(7)(C).

Here four terms are significant: "production", that is, the release of the records, is what must be expected to have the undesired result; "expected," meaning what may be predicted with probability by a reasonable person, that is, the standard is objective; "unwarranted", that is, unjustified by the purpose of the statute; and "privacy", that is, a right held dear in our democracy. The root meaning of privacy has perhaps been best expressed in the article that launched its legal career. The principle is "that of an inviolate personality." Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193, 205 (1890). The statutory term, it is worth adding, is modified by "personal" and is phrased as "privacy", not "privacy interest."

The statutory command coupled with the statutory exemption requires "balancing" of the personal privacy expected by a reasonable person to be invaded by the production of the records against the public purpose served by release. *Reporters Committee*, 489 U.S. at 776, 109 S. Ct. 1468. Deference to the determination of the agency that the exemption applies is not due; the burden of the proof that the request may be properly denied because of an exemption rests with the agency. The court "shall determine the matter de novo." § 552(a)(4)(B). The "burden is on the agency to sustain its action." *Id.*

Application of the Statute. Favish's request focuses on how the OIC conducted its investigation of Foster's death. So doing, his request is in complete conformity

with the statutory purpose that the public know what its government is up to. Nothing in the statutory command conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency, although at times evidence of such knowledge has been referred to as enhancing the urgency of the request. See *Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir.1992). Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts; but it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments. *See Washington Post Co. v. U.S. Dep't of Health and Human Services*, 865 F.2d 320, 325 (D.C. Cir. 1989).

Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations. To anyone familiar with famous cases in the Old World or in the New it is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point. The statute establishes a right to look, a right to speculate and argue again, a right of public scrutiny that can be denied only if the relevant statutory exemption applies.

The exemption invoked now is the privacy of "the Foster family members." The OIC relies on a declaration made under oath by Sheila Foster Anthony, Foster's sister, that release of the photos "would set off another round of intense scrutiny by the media," leading the family to be "the focus of conceivably unsavory and distasteful media coverage." The family members who would be distressed by this feared coverage are identified by Anthony as Foster's mother, his children, herself, and Foster's widow.

Strictly speaking, it is not "the production" of the records that would cause the harms suggested by the declaration but their exploitation by the media including publication on the Internet. But the statutory reference to what may "reasonably be expected" encompasses the probable consequences of the release. A preliminary question for decision is whether these consequences would invade the personal privacy of persons protected by the exemption. The question is not free from difficulty due to the imprecision of the statutory phrase.

The statute does not identify whose personal privacy may not be unjustifiably invaded. The statute therefore leaves open the possibility that the exemption does extend to others than the person to whom the information relates, although as a matter of first impression "personal" might seem to refer only to that person. As it happens, the question is not one of first impression in the courts. Release of the photos of the body of the assassinated president has been held to invade the privacy of members of the Kennedy family. *Katz v. National Archives & Records Administration*, 862 F. Supp. 476, 485 (D.D.C. 1994*), aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995). Release of a tape of the last conversation of the astronauts on the Challenger has been blocked because it would invade the privacy of their families. *See New York Times Company v. National Aeronautics and Space Administration*, 920 F.2d 1002, 1009-10 (D.C. Cir. 1990) and 782 F. Supp. 628 (D.D.C. 1991) (on remand).

It could, no doubt, be suggested that the president or the astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families. That would be a constricted reading of

the precedents. What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.

We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

Balancing is one of the most pervasive and most elusive metaphors in the law. We do not literally balance, because what is being brought into a comparison has no weight. To many, balancing sounds like assigning hypothetical weights. To others, it may suggest the kind of equilibrium the biological systems of the body achieve. Taken in either sense, balancing seems to require the exercise of discernment in a particular case. Our standard of review of such a question has been carefully set out in *Schiffer v. The FBI*, 78 F.3d 1405 (9th Cir. 1996). Where facts are not in dispute, we review de novo as a matter of law the district court's determination of "whether a document fits within one of FOIA's prescribed exemptions." *See id.* at 1409.

We do not, however, have before us all the relevant facts. The OIC represents that the 10 withheld photographs are "graphic, explicit, and extremely upsetting." That description is not true of the photo already published in *Time* and on television, showing a hand hold-

ing a gun. It may be true of the remaining 9 photos. But no court has ever seen them. The district court has discretion to decide a FOIA case on the basis of affidavits, and affidavits are in some cases sufficient. *Quinon v. F.B.I.*, 86 F.3d 1222, 1229 (D.C. Cir. 1996). But when the agency affidavits are insufficiently detailed, *in camera* review is appropriate. *Id.* at 1228. Balancing without a knowledge of what the photos show would be an exercise in the air. Accordingly, we return the case to the district court to examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release.

Conclusion. The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"),[1] Vincent W. Foster Jr.'s surviving family members have a cognizable privacy interest in the ten post-mortem Polaroid photographs of Vincent Foster's face and body that Appellant Allan J. Favish has requested. I also agree that the family's privacy interest in the post-mortem photographs taken at the scene of Foster's death by a self-inflicted gunshot wound must be balanced against the public's interest in

[1] Exemption 7(c) exempts production of "records or information compiled for law enforcement purposes . . . to the extent that production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C).

disclosure. I disagree, however, that remand for an in camera inspection of the photographs is necessary before these interests can be properly balanced. I believe the affidavit and exhibits contained in the "Vaughn index"[2] submitted by the Office of Independent Counsel ("OIC") are sufficiently detailed to justify withholding these photographs under Exemption 7(C). I also believe that the district court properly balanced the family's privacy interest against the public's interest in the production of the photographs and concluded that their disclosure "'could reasonably be expected to constitute an unwarranted invasion of [the family's] personal privacy.'" *See Hunt v. FBI*, 972 F.2d 286, 287-89 (9th Cir.1992) (quoting 5 U.S.C. § 552(b)(7)(C)). On this basis, I would hold that the nine, never-before-released post-mortem Polaroid photographs of Foster's face and body are exempt from disclosure under Exemption 7(C). I would, however, order the release of the photograph of Foster's right hand clutching the gun, which previously appeared in Time Magazine and other media.

I. The Vaughn Index

A. General Principles

In a FOIA case, the government agency seeking to withhold requested documents has the burden of proving the applicability of any FOIA exemption claimed, *see Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996), and "the district courts are to review de novo all exemption claims advanced" by the government, *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir.

[2] The Vaughn index derives its name from the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)

1987). Because the agency has sole access to the withheld documents, the ordinary rules of discovery do not operate in a FOIA case to "give each party access to the evidence upon which the court will rely in resolving the dispute between them." *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991). "'This lack of knowledge by the party seeking disclosure seriously distorts the traditional, adversary nature of our legal system[ ].'" *Id.* (quoting *Vaughn*, 484 F.2d at 824) (alteration in original). To correct this imbalance, the courts devised the Vaughn index requirement, which may be imposed on government agencies seeking to withhold documents requested under FOIA. *See id.; see also Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999) (noting that "[t]here is no statutory requirement of a Vaughn index or affidavit.").[3]

"The purpose of the Vaughn index is to 'afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholdings.'" *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995) (quoting *Wiener*, 943 F.2d at 977). The Vaughn "index functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Wiener*, 943 F.2d at 977-78. "Consistent with its purpose, a Vaughn index is not required where it is not needed to restore the traditional adversary process." *Wiener*, 943 F.2d at 978 n.5. For example, a Vaughn index is unnecessary where

[3] In fact, "Congress did not speak of an "index" [in FOIA]. The statute says that an agency has [only] to 'notify the person making such request of [the] determination [to withhold the documents sought] and the reasons therefor.'" *Fiduccia*, 185 F.3d at 1042 & n.9 (quoting 5 U.S.C. 552(a)(6)(A)(*i*).

"the FOIA requester ha[s] acquired sufficient facts to permit the adversary process to function." *Id.* (citing *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir. 1981)). "[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index." *Minier*, 88 F.3d at 804.

To fulfill its purpose, a Vaughn index must "identify[] each document withheld, the statutory exemption claimed, and [provide] a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Id.* at 977. The Vaughn index may consist of detailed affidavits or other evidence "showing that the information logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800 (citation omitted). Such affidavits may not be "vague" or merely "conclusory," *King*, 830 F.2d at 219, but should disclose "as much information as possible without thwarting the [claimed] exemption's purpose," *Wiener*, 943 F.2d at 978 (citation omitted) (alteration in original).

B. The Sufficiency of the OIC's Vaughn Index

The majority opinion states that the OIC's Vaughn index is insufficiently detailed with respect to the ten post-mortem Polaroids at issue on appeal[4] because the

[4] The OIC's Vaughn index actually consisted of an affidavit and exhibits numbering over 200 pages that addressed Favish's FOIA request in its entirety. Favish's FOIA request ultimately embraced over a hundred photographs, including 129 photographs and written information appearing in 32 photographs (on front or back). The index provided: (1) photocopies of the fronts and backs of all photographs that had been previously released by the OIC to the United States Senate; (2) a photocopy of the FBI Receipt describing the photographs that had not been previously released at all; (3) a description of the OIC's system for searching for the

OIC described these photographs as "graphic, explicit, and extremely upsetting," including the photograph depicting Vincent Foster's hand clutching the gun. Majority Op. at 1174. According to the majority opinion, because the latter photograph is not "graphic" and no court has ever seen the nine other photographs, "[b]alancing [the public's interest in their disclosure against the personal privacy interest in nondisclosure] without a knowledge of what the photos show would be an exercise in the air." *Id.* On this basis, the majority concludes that remand for an in camera inspection of the photographs is necessary. I disagree.

The fact that no court has seen these photographs is not dispositive on the question whether in camera review is required. If that were the litmus test for when in camera review should be undertaken, in camera review would be required in almost every FOIA case. That is not what FOIA requires. Under FOIA, "the decision to conduct an in camera review is committed to the broad discretion of the trial court judge." *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (citations omitted); *see also* 5 U.S.C. 552(a)(4)(B) (Supp. 1999). "The in camera review provision . . . is designed to be invoked when the issue before the District Court *could not otherwise be resolved;* It . . . does not mandate that the documents be individually examined in every

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requested photographs and detailed explanation of the form used for identifying and justifying any redacted information or photographs withheld in their entirety; (4) the pre-litigation correspondence between the parties; and (5) narrative descriptions of the requested photographs and written information appearing on them that generally identified the photographs or portions thereof being withheld by the OIC, the exemption claimed, and the justification for withholding the exemption, including the interests to be harmed from the disclosure of the information.

case." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978) (emphasis added). Thus, "an in camera review should *not* be resorted to as a matter of course, simply on the theory that 'it can't hurt.'" *Quinon*, 86 F.3d at 1228 (emphasis added).

I believe that the OIC's Vaughn index's description of the ten post-mortem Polaroid photographs is sufficiently detailed for the district court to resolve the issues in this case. Indeed, it is unclear exactly what an in camera review would add to the district court's already thoughtful and thorough analysis of the issues here.

The OIC's Vaughn index did not just describe the photographs as "graphic" as the majority opinion suggests. The index contained a general narrative description of the nine post-mortem photographs, which stated:

> The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C).

The OIC's Vaughn index also included a photocopy of the FBI "Receipt for Property Received/Returned/Released/Seized" ("the FBI Receipt") that set forth a handwritten description of the ten post-mortem Polar-

oid photographs and eight other photographs[5] that were taken by the National Park Service at the scene of Vincent Foster's death in Fort Marcy Park. The FBI Receipt uses Vincent Foster's initials, "VF," and describes the ten post-mortem Polaroids as follows:

> VF's body—looking down from top of berm
>
> ... VF's body—focusing on face . . . VF's body—focusing on rt. side shoulder/arm
>
> * * * * * *
>
> ... right hand showing gun & thumb in guard
>
> * * * * * *
>
> ... VF's body taken from below feet
>
> ... VF's body focusing on right side & arm
>
> ... VF's body focus on top of head thru heavy foliage
>
> ... VF's body focus on head & upper torso
>
> ... VF's face—looking directly down into face
>
> ... VF's face—Taken from right side focusing on face & blood on shoulder. . . .

No one disputes that Vincent Foster died when a .38 caliber revolver was placed in his mouth and the trigger was pulled. It is therefore difficult to understand just

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[5] The other eight Polaroids listed on the FBI Receipt on page 2112 are not at issue on appeal because copies of seven of them were released to Favish pursuant to stipulation lodged in district court on February 9, 1998, and the district court ordered the release of a copy of the eighth photograph, depicting Vincent Foster's eyeglasses lying on the ground at Fort Marcy Park. The eight Polaroids released pursuant to stipulation depict the location and environs where Vincent Foster was found dead and the interior of the car he purportedly drove to Fort Marcy Park.

how much more detail the OIC would have had to provide to satisfy the majority. Certainly, what the OIC did provide was "as much information as possible without thwarting the purpose of the exemption claimed." *Wiener*, 943 F.2d at 979.

More importantly, Favish does not argue with the OIC's description of what the photographs depict (e.g., the head, face, or body of Vincent Foster). Nor does he suggest that the OIC's description of these photographs was provided in bad faith. His argument is with how the OIC interpreted the photographs and the conclusions the OIC drew from them. In particular, Favish disputes the OIC's conclusion that the photographs establish that Foster committed suicide. Generally speaking, in camera inspection would be appropriate where a FOIA request specifies only the *kind* of information sought and the Vaughn index provides insufficient detail for the district court to determine whether the withheld documents qualify for the claimed exemption. *See Wiener*, 943 F.2d at 978-79. But where, as here, the Vaughn index provides (1) sufficient detail to permit meaningful review of the exemptions claimed, (2) there is no evidence of bad faith on the part of the governmental agency, and (3) "the dispute turns on the . . . parties' interpretations of [the withheld] documents," not their contents, in camera review may not be necessary. *Quinon*, 86 F.3d at 1228. Given such circumstances, I cannot agree with the majority opinion's conclusion that the district court abused its discretion in declining to conduct an in camera review in this case.

Finally, the record and discussion *infra* clearly establish that Favish had "sufficient information [about the post-mortem photographs] to present a full legal argument" in this case and in another FOIA case presented

to the Court of Appeal for the District of Columbia. *See Accuracy in Media, Inc. ("AIM") v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111, 120 S. Ct. 1966, 146 L. Ed. 2d 797 (2000). AIM's FOIA case sought black and white copies of precisely the same photographs that Favish seeks color copies of here. As AIM's co-counsel, Favish wrote the reply brief considered in AIM's appeal to the D.C. Circuit. That reply brief is in large measure identical to the appellate brief filed in his appeal to this court. The D.C. Circuit held the photographs exempt under Exemption 7(C). *See id.* at 123-25. In so ruling, the court rejected the same claim about the Vaughn index that Favish makes in this case, viz: "that the Vaughn index falls short in not revealing just how graphic each of the photos is." *Id.* at 125. As the D.C. Circuit stated: "Given the subject matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Id.* I agree.

II. Exemption Under 7(C)

A. General Principles

Having determined that in camera review is unnecessary because the factual basis for the district court's decision is sufficient, the next issue is whether the OIC properly withheld the post-mortem Polaroid photographs under Exemption 7(C). Although FOIA's exemptions " 'must be narrowly construed,' . . . the[se] . . . exemptions are intended to have meaningful reach and application." *John Doe Agency v. John Doe. Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)).

Congress enacted Exemption 7(C) and the other FOIA exemptions because it "'realized that legitimate . . . private interests could be harmed by release of certain types of information.'" *Id.* at 152, 110 S. Ct. 471 (quoting *FBI v. Abramson*, 456 U.S. 615, 621, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982)). Thus, Exemption 7(C) permits the government to withhold documents "compiled for law enforcement purposes, but only to the extent that [the government establishes that] the production of such records could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. 552(b)(7)(C); *see also Schiffer v. FBI*, 78 F.3d 1405, 1409-10 (9th Cir. 1996). To meet its burden, the government need show "only that an unwarranted invasion of privacy could be reasonably expected, not that it will inevitably occur." *Hunt*, 972 F.2d at 288.

In determining whether the government has met its burden of proof, "a court weighs 'the public interest in disclosure against the possible invasion of privacy caused by the disclosure.'" *Id.* at 1409. (quoting *Hunt*, 97 F.2d at 287). The "sole cognizable public interest for FOIA is the interest 'to open agency action to the light of public scrutiny,' to inform the citizenry 'about what their government is up to.'" *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) (quoting *Department of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772-73, 109 S. Ct. 1468, 103 L. Ed. 2d 774(1989)). The "'identity of the requesting party' . . . [thus has] 'no bearing on the merits of his [ ] FOIA request.'" *Schiffer*, 78 F.3d at 1411 (quoting *Reporters Comm.*, 489 U.S. at 771, 109 S.

Ct. 1468) (second alteration in original).[6] Rather, "[w]hether disclosure of a document under Exemption 7(C) is warranted must turn on the *nature of the requested document and its relationship to [this] 'basic purpose . . . .'*" *Reporters Comm.*, 489 U.S. at 772, 109 S. Ct. 1468 (internal citation omitted) (emphasis added).

To determine whether the government met its burden of proof concerning the applicability of Exemption 7(C) to the withheld Polaroid photographs, an understanding of the government's actions concerning Vincent Foster's death is necessary. *See Wiener*, 943 F.2d at 985 ("[T]he public interest in disclosure, and the proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances."). This factual perspective is essential to the determination whether production of the photographs will shed any light on "what their government is up to." *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. 1468.[7]

B. Factual Background

1. Vincent Foster's Death and the Multiple Investigations That Ensued

In late afternoon on July 20, 1993, Deputy White House Counsel Vincent W. Foster Jr. was found dead by a private citizen in Fort Marcy Park, a national park located in a Northern Virginia suburb of Washington,

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[6] The majority thus mistakenly ascribes undue importance to the fact that Favish is a "skeptical" "lawyer" who personally disagrees with the government's interpretation of the post-mortem photographs.

[7] Here, the fact that the Polaroid photographs were "compiled for law enforcement purposes" is not disputed.

D.C. According to eyewitness accounts and the investigative reports of the FBI and U.S. Park Service published by a Senate committee on July 29, 1994, *see Hearings Relating to Madison Guaranty S & L and the Whitewater Development Corporation—Washington, D.C. Phase*, volume II, 103rd Cong. (2nd sess.1994) ("Senate Hearings Volume II"), a 911 call summoned the United States Park Police to a sloping embankment where a body—later identified as Vincent Foster—lay dead. Park Police found Foster's body facing up, with his head positioned slightly below the top of a berm and his body sloping down the embankment, enveloped in foliage; his extremities were apparently not clearly visible to witnesses who stood on the top of the berm. Park Police investigators took Polaroid and 35mm photographs of the death-scene, surrounding environs, and Mr. Foster's face and body—including the ten Polaroids at issue in this appeal. As they did so, they observed a .38 caliber revolver in Mr. Foster's right hand (his thumb still in the trigger guard), gunpowder residue or burns on his right hand web and forefinger, and a gunshot wound to his head. Blood was visible in his nose and mouth area, on his right shoulder area, and in a pool underneath his head. There was no sign of a struggle, no other signs of trauma to the body, and no indication that the foliage or vegetation around his body had been trampled by others.

Five government inquiries investigated the circumstances and cause of Vincent Foster's death. Because Fort Marcy Park is a national park, the U.S. Park Police, a component of the U.S. Park Service, had primary jurisdiction over the first investigation into Mr. Foster's death. After his death, a handwritten note was found torn in pieces at the bottom of Mr. Foster's

briefcase in his White House office. The FBI had jurisdiction over the investigation into the circumstances surrounding the discovery of the note. On August 10, 1993, both the Park Police and the FBI announced their findings. The Park Police concluded that Mr. Foster committed suicide, and the FBI found no criminality in connection with the note's discovery.

A flurry of media exposes followed both announcements. Faced with mounting speculation about the circumstances of Vincent Foster's death and the Park Police's investigation into it, Attorney General Janet Reno appointed Robert B. Fiske, Jr. as a regulatory Independent Counsel, pursuant to 20 C.F.R. § § 600 and 603.1, in part to investigate the circumstances surrounding Vincent Foster's death and the events that occurred in the White House following his death. On June 30, 1994, Mr. Fiske issued a 58-page public report on the death of Vincent Foster that reached the same conclusion as the Park Police: the "overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide . . ." by a self-inflicted gunshot wound. *Report of the Independent Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr.* (June 30, 1994).

Meanwhile, the House and Senate launched additional inquiries into the circumstances of Vincent Foster's death. Congressman William F. Clinger, Jr., the ranking Republican on the House Committee on Government Operations, instructed the Committee's staff to "thoroughly review . . . the investigation into the death of White House aide Vincent W. Foster to determine if there had been any improper manipulation of the investigation by the White House or others." 140 Cong. Rec. H2177-05 (daily ed. Apr. 12, 1994) (statement of Rep. Clinger). And the Senate Committee on Banking, Housing, and Urban Affairs conducted public hearings to "investigat[e] . . . and study" the Whitewater matter and "all matters that have a tendency to reveal the full facts about:. . . . (B) the Park Service Police investigation into the death of White House Deputy Counsel Vincent Foster; and (C) the way in which White House officials handled documents in the office of White House Deputy Counsel Vincent Foster at the time of his death; and . . . make such findings of fact as are warranted and appropriate. . . ." S. Res. 229, 103d Cong., 2d Sess. (1994), 140 Cong. Rec. S7076-01 (June 16, 1994). Both inquiries categorically concluded that Mr. Foster committed suicide. *See Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, On the Death of White House deputy Counsel Vincent W. Foster, Jr.* (Aug. 12, 1994) ("all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."); S. Rep. No. 103-433, 103d Cong., 4 (1995) ("[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gunshot wound.").

Nevertheless, a fifth inquiry was undertaken by the Office of Independent Counsel pursuant to the Ethics in Government Act of 1978, 28 U.S.C. 591-599, as reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732. On August 5, 1994, Kenneth W. Starr was appointed statutory Independent Counsel by the Special Division of the United States Court of Appeals for the District of Columbia Circuit ("the Special Division"). Mr. Starr

was authorized to conduct an extensive investigation into the circumstances of Mr. Foster's death, the handling of documents in Mr. Foster's White House office following his death, and other matters. *See Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass'n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997) (leave to publish granted by the Special Division on Oct. 10, 1997, pursuant to 28 U.S.C. 594) ("Starr Report"). To conduct the investigation, Mr. Starr assembled a team of experienced investigators and renowned forensic experts.[8] *See id.*

After a three-year investigation involving interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs, Mr. Starr reached the same conclusion about Vincent Foster's death that the Park Police, Independent Counsel Fiske, and the House and Senate Committees had

[8] "The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C. for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides." *Id.* at 111. The forensic experts included Dr. Henry C. Lee, Ph.D., an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Brian D. Blackbourne, M.D., a forensic pathologist who is Medical Examiner for San Diego County; and Dr. Alan L. Berman, Ph.D, an expert suicidologist who currently is Executive Director of the American Association of Suicidology. *See id.* at 2.

reached: "The available evidence points clearly to suicide as the manner of death."[9] *Id.*

In sum, as the district court observed in this case, Vincent Foster's death has been the subject of intense scrutiny by the national media and "exhaustive[ly] investigat[ed]" in the course of five government inquiries. The unanimous, yet independent, conclusion of all inquiries is that Mr. Foster died from a self-inflicted gunshot wound on July 23, 1993 in Fort Marcy Park, Virginia.

2. Favish's FOIA Request and Complaint

On January 6, 1997—seven months before Mr. Starr filed his final report on the death of Vincent Foster with the Special Division of the District of Columbia Circuit and ten months before the OIC received the court's approval to publicly release that report[10]

[9] Mr. Starr's conclusion reflected that of Dr. Lee ("[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide...."), Dr. Blackbourne ("Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a . 38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."), and Dr. Berman ("In my opinion and to a 100% degree of medical certainty the death of Vincent Foster was suicide. No plausible evidence has been presented to support any other conclusion.").

[10] The Independent Counsel Reauthorization Act ("the Act") requires an independent counsel "to file a final report with the [Special] division of the [D.C. Circuit] court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." 28 U.S.C. 592(h)(1)(B). Until that report is filed and the D.C. Circuit approves it, an OIC's investigation is considered ongoing. While an investigation is ongoing, the Act mandates that the OIC "exercise restraint" in releasing information that prosecutors "do

—Favish sent a letter to the OIC requesting the release under FOIA of the "highest quality duplicate photographic [color] prints" of "photographs taken in connection with the investigation into the death of Vincent Foster." Favish specifically requested ten categories of photographs. The photographs requested in eight of the categories were identified by the page in Senate Hearings Report Volume II on which the Senate Committee on Banking, Housing, and Urban Affairs had previously published copies. But, because the photograph of Mr. Foster's right hand clutching the gun and the nine post-mortem Polaroid photographs of Mr. Foster's face and body had not been published in the Senate Hearings Report Volume II,[11] Favish re-

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not normally provide the public," *Conference Report on S. 24, Independent Counsel Reauthorization Act of 1994*, H.R. 103-511, 140 Cong. Rec. H36907-02, at *H3702 (2d Sess.1994), which would include death-scene Polaroid photographs. Congress instructed the OIC to exercise particular restraint where, as in the case of Vincent Foster's death, it decides not to prosecute anyone. *See id.*

[11] Since the U.S. Park Police turned the post-mortem photographs over to the OIC in 1994, the OIC has maintained that the privacy interests of Mr. Foster's surviving family members in these gruesome death-scene photographs outweigh the public interest in disclosure. For this reason, the OIC has refused to publish them in any form—including the OIC's report to Congress dated June 30, 1994 (prepared by Independent Counsel Robert B. Fiske, Jr.) and its court-approved summary report dated October 10, 1997 (prepared by Independent Counsel Kenneth W. Starr). *See* Senate Hearings Volume II; Starr Report.

The OIC stated in the Starr Report that "based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious." *See Starr Report* at 16-17 (citing by way of comparison, *e.g.*, *Navy Report Omits Suicide Notes*, N.Y. Times, Nov. 2, 1996, at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to

quested these photographs in two separate categories. One category requested the photograph of "Mr. Foster's hand with a gun still in it" that purportedly was broadcast by ABC-TV News in March 1994, reprinted in Time Magazine on March 18, 1996, and appears to have been "listed on page 2112" of the Senate Hearings Report Volume II. In the second category, Favish simply requested those Polaroid photographs "listed on page 2112" of the Senate Hearings Report Volume II. Page 2112 consists of a photocopy of the FBI Receipt discussed *supra*, which bears the handwritten description of the eighteen photographs taken by the National Park Service in Fort Marcy Park within hours of Vincent Foster's death.

By letter dated January 24, 1997, the OIC denied Favish's request in its entirety, citing Exemptions 7(A), 5 U.S.C. 552(b)(7)(A), which exempts from disclosure information that may reasonably interfere with an ongoing law enforcement investigation or proceeding, and Exemption 7(C). Favish administratively appealed on January 28, 1997. The appeal was denied by the OIC on February 19, 1997.

On March 6, 1997, Favish filed a complaint for injunctive relief in district court for the Central District of California. The complaint sought release of all photographs and information embraced by Favish's FOIA request.

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make the notes public. . . . Many other items in the report are blacked out, like the autopsy report and the identities of people interviewed by investigators."); *Katz v. National Archives and Records Admin.*, 68 F.3d 1438, 1441 (D.C. Cir. 1995) ("Out of concern for the Kennedy family's privacy, . . . the x-rays and photographs did not become a part of the record of the Warren Commission.")).

After the Special Division granted the OIC leave to publicly release the Starr Report on October 10, 1997, the OIC reviewed the photographs and the information written on them that Favish sought by his FOIA request. The Special Division's approval of the Starr Report's public release marked the official conclusion of Mr. Starr's OIC investigation into Vincent Foster's death. Thereafter, the OIC withdrew its objection to production of the photographs requested on the basis of FOIA Exemption (b)(7)(A).

On January 5, 1998, the OIC filed a *Vaughn* index and released black and white copies of 118 photographs in full (front and back) and fourteen photographs in part (front or back) that it had previously withheld. Copies of all of the released photographs were published in Senate Hearings Report Volume II.

On February 12, 1998, the district court entered the parties' "Stipulation to Dismiss With Prejudice Claims to Information Withheld Pursuant to Exemption (b)(3) and Claims as to Certain Information Withheld Pursuant to (b)(7)(C) and Identification of What Remains At Issue." Pursuant to that stipulation, the only photographs that remained in dispute were eleven post-mortem photographs taken in Fort Marcy Park: one depicting Mr. Foster's right-hand holding the gun, one depicting only Mr. Foster's eyeglasses lying on the ground in Fort Marcy Park, and nine post-mortem photographs of Mr. Foster's body and face. Exemption 7(C) was the only exemption claimed. And the parties stipulated that "[t]he *only* issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." (Emphasis added.)

On February 11 and 13, 1998, the parties filed cross-motions for summary judgment. In support of its summary judgment motion and to establish the significant privacy interest at stake, the OIC filed the declaration of Sheila Foster Anthony, Mr. Foster's surviving sister. Writing on behalf of Vincent Foster's widow, three children, elderly mother, and other family members, Ms. Anthony expressed the

> fervent[ ] belie[f] that releasing any photocopies depicting Vince's body post-mortem would constitute a painful warranted [*sic*] invasion of my privacy, my mother's privacy, and the privacy of Lisa Moody (widow of Vincent Foster), her three children and other members of the Foster family.
>
> Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper and magazine articles and television reports that followed Vince's death. An intensely emotional and private matter drew national attention, and reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. They do to this day. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.
>
> I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust,

unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic means. No member of any family should ever be concerned with the possible public exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why the photographs should be released. The mere suggestion that these photographs would be released is unconscionable. The release of these photographs would only bring more agony to members of my family.

We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I cannot adequately express the anguish release of these photographs would bring to me and the entire Foster family.

The Court has been asked by the Government to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect Vince's family, but particularly his children, and his 83 year old mother, from further invasion and the distressing events that surely would result from the release of the photographs.

After hearing oral argument and reviewing the evidence, the district court granted partial summary judgment for Favish and ordered the OIC to produce the Polaroid photograph of Mr. Foster's eyeglasses lying on the ground at Fort Marcy Park and to produce color copies, at Favish's expense, of any photograph released in response [to] his FOIA request if it was originally taken in color. The court, however, ruled that the privacy interests of Mr. Foster's surviving family members outweighed the public interest in disclosure of the nine post-mortem Polaroid photographs of Vincent Foster taken in Fort Marcy Park under Exemption 7(C) and granted the OIC partial summary judgment on this basis. Favish timely appeals.

C. Balancing the Personal Privacy Interest at Stake Against the Public's Interest in Disclosure

1. The Privacy Interest

Favish concedes that release of the nine post-mortem Polaroids of Vincent Foster's face and body are likely to cause to Foster's surviving family members pain and anguish. Favish argues, however, that "family grief" or "emotional grief" is not a legally cognizable privacy interest under FOIA—an argument that the majority and I reject. As noted *supra*, the Court of Appeals for the District of Columbia in *AIM* was confronted with essentially the same FOIA request as that at issue here. As the *AIM* court stated:

> [one] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle

> the resulting photos. While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy—even though the holders of the interest are distinct from the individual portrayed.

Id. at 123.

In the present case, the majority and I agree that, as a matter of law, FOIA protects the privacy interests that Vincent Foster's surviving family members have in the post-mortem photographs of the deceased and the intimate details of the circumstances surrounding his death that they reveal. *Cf. Bowden v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (holding that the privacy interest of a deceased's family in the deceased's autopsy report is protected by FOIA's Exemption (b)(6)); *cf. also Hale v. United States Department of Justice*, 973 F.2d 894, 902 (10th Cir. 1992) (finding that Exemption 7(C) exempts photographs of a deceased murder victim from disclosure because no discernible public interest outweighed "the personal privacy interests of the victim's family"), *vacated on other grounds*, 509 U.S. 918, 113 S. Ct. 3029, 125 L. Ed. 2d 717 (1993), *implicitly reinstated on remand*; *New York Times Co. v. NASA*, 782 F. Supp. 628 (D.D.C. Cir. 1991) (finding that the Challenger astronauts' surviving families have "valid and substantial" privacy interests in the voice communications of the astronauts tape recorded aboard the space shuttle immediately prior to its explosion); *Katz v. National Archives & Records Admin.*, 862 F. Supp. 476, 482 (D.D.C. 1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy).

The survivors' privacy interests also involve their "right to avoid [ ] disclosure of personal matters" or at least "to control the dissemination" of such information. *Reporters Comm.*, 489 U.S. at 762, 762-64 & n.16, 109 S. Ct. 1468. Favish argues that such privacy interests have been diminished in this case because the circumstances of Vincent Foster's death are publicly known. He is mistaken. "The Supreme Court explicitly rejected [a similar] argument in *Reporters Committee*, stating that . . . the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Schiffer*, 78 F.3d at 1410-11 (quoting *Reporters Comm.*, 489 U.S. at 770-771, 109 S. Ct. 1468; *see also FLRA*, 510 U.S. at 449, 114 S. Ct. 1006) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information be available to the public in some form.").

Here, there is simply no question that the release of these photographs "could reasonably be expected to constitute an unwarranted invasion" of the Foster family's personal privacy. Doing so will deprive the family of their right to "avoid" the dissemination of these highly personal photographs and to keep the "personal facts [they depict] away from the public eye." *Reporters Comm.*, 489 U.S. at 769-70, 109 S. Ct. 1468 (citing *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)). And that constitutes a cognizable and significant invasion of their privacy under FOIA. Unless these photographs will "shed light on what the government is up to," and thus serve the sole public interest cognizable under FOIA, they should not be

ordered released. *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. 1468.

2. The Public's Interest in Disclosure

The governmental agency in question here is the OIC. The conduct in question is the OIC's two investigations into the circumstances of Vincent Foster's death and their conclusion that he committed suicide. As the district court stated, the public has a substantial interest in ensuring that the "OIC conducted a proper and thorough investigation."

But Favish has made no showing that anyone connected with the OIC's investigations—including Mr. Starr—engaged in wrongful conduct, failed in his or her official duties, or that the nine post-mortem photographs at issue will shed any light on the integrity of their investigations, the nature of the OIC's conduct, or the correctness of its conclusions. Although the government bears the burden of establishing that the photographs are exempt from disclosure under FOIA, *Schiffer*, (citing 5 U.S.C. 552(a)(4)(B)), "the person requesting the information must identify with reasonable specificity, how disclosure would advance the public interest," *Hale*, 973 F.2d at 900. Favish has failed to do so in this case with respect to the nine post-mortem Polaroid photographs of Foster's face and body.

Favish's overarching argument is that the photographs are needed because the OIC's investigation was "grossly incomplete and untrustworthy." Such "generic platitudes clearly are not enough" to tilt the balance in favor of disclosure. *Id.* As the Seventh Circuit observed, the contention that private information is needed "to serve as a watchdog over the adequacy and

completeness of an FBI investigation . . . would apparently apply to every . . . criminal investigation, severely vitiating the privacy . . . provision [ ] of [E]xemption (C)." *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981). As a general rule, "[g]overnment records and official conduct [are accorded] a presumption of legitimacy." *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991). If the mere allegation that a senior government official, like an independent counsel, is "untrustworthy" or incompetent was sufficient to warrant disclosure of private matters that the senior official happened to have compiled, then FOIA's privacy exemptions would be meaningless. *See id.*

Five separate government inquiries have determined that Vincent Foster committed suicide by a gunshot in Fort Marcy Park on July 23, 1993. The two OIC investigations and the two congressional inquiries each sprung from doubt as to the thoroughness and integrity of the preceding investigation(s). Yet each ultimately reached the same conclusions. And each found no wrongdoing in the preceding investigation(s). Intense media scrutiny of these investigations and of the circumstances of Mr. Foster's death has also reached the same conclusion and has uncovered no wrongdoing. Clearly, the public's interest in further investigating Vincent Foster's death has significantly diminished.

Favish's individual contentions that disclosure of the nine post-mortem Polaroids will serve the public's interest also fall short of justifying their disclosure. Three of Favish's contentions have no logical link to the nine post-mortem Polaroids. Favish disputes statements by Mr. Starr made in his report regarding which officials were present during Vincent Foster's autopsy.

But the nine photographs at issue were taken at Fort Marcy Park and depict Mr. Foster's face and body only. They will not shed light on who was present during his autopsy at all. Favish also takes issue with the witness identifications of Mr. Foster's car in Fort Marcy Park at the time of his death. Again, the nine post-mortem photographs will not shed light on the basis for or veracity of these witness statements. Finally, Favish contends that there are possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow. Many of the 119 photographs already released to Mr. Favish depict the gun that was found at the scene of Mr. Foster's death and therefore speak directly to this aspect of the investigation. Nevertheless, because the photograph of Mr. Foster's right hand still clutching the gun has apparently already appeared in the national media and may shed further light on this aspect of the investigation, I believe that it should be released. The remaining nine post-mortem photographs, however, do not depict the gun and therefore should not be released for this purpose.

Favish's remaining contention is similarly insufficient to justify disclosure. Favish contends that the nine photographs of Vincent Foster's face and body are needed to explain purported deficiencies and inconsistencies in the Starr Report concerning the nature of Mr. Foster's wound.[12] The Starr Report concluded

[12] For the first time on appeal, Favish also contends that the photographs at issue are needed to discern the correctness of two of Dr. Lee's conclusions: (1) that Vincent Foster's body was not "dragged" to the location where his body was found; and (2) that the post-mortem photographs possibly reveal bloodstains on the immediately surrounding vegetation. As purported proof that Dr. Lee's conclusion regarding "dragging" should not be believed, Favish points to the statements of the Park Police on the scene and Dr. Haut that Mr. Foster's body started to "slide down the hill" when they rolled him over to examine him and that they had to "pull" him back up. According to Favish, if Vincent Foster's body slid down the hill at all, Dr. Lee should have reported that there was some evidence of "dragging." At best, Favish's contention is speculative and amounts to nothing more than a difference of opinion. As purported proof that Dr. Lee's statement concerning possible bloodstains on the vegetation was erroneous, Favish points to statements by a Park Police officer on the scene that "there was no blood splatter on the plants or trees surrounding the decedent's head" and a statement by Dr. Haut that he could recall no blood "on the vegetation around the body." Dr. Lee did not conclude that there were bloodstains on the vegetation, only that after viewing an enlarged, close-up view of the vegetation, there may have been bloodstains. *See Starr Report* at 59. Again, Favish's contention amounts to little more than a difference of opinion, with no suggestion of official misconduct or wrongdoing.

that Vincent Foster died of a self-inflicted "gunshot [wound] through the back of his mouth exiting the back of his head" and that the exit wound was "three inches from the top of the head." *Starr Report* at 1, 31. Favish disputes this conclusion for two reasons: First, Favish contends that the Starr Report did not adequately explain the comment of a paramedic on the scene who viewed the body from a distance of two to three feet and initially reported that the *entrance* wound was on Mr. Foster's neck, near the jawline. Second, he contends that the Starr Report failed to mention that the report of the medical examiner at the scene, Dr. Donald Haut of the Fairfax County Medical Examiner's Office, was internally inconsistent. On one page of the report, Dr. Haut described Mr. Foster's wounds as "perforating gunshot wound mouth-head" and on the another page he described it as "mouth to neck." Favish claims

that the statement on Dr. Haut's report that the wound was "mouth-head" was the product of an alteration.

As the D.C. Court of Appeals explained in *AIM* when it considered and rejected these same contentions:

> Depending on what one views as the "top" of the head, the discrepancy between [the statement that the exit wound was three inches from the top of the head] and assertions of a neck exit wound may be matters of characterization. Further, the paramedic, after reviewing photos (presumably belonging to the disputed set), admitted that he may have been mistaken about Foster having a neck wound. *Starr Report* at 34 n.77. Dr. Haut's report is internally inconsistent, with one assertion consistent with the later reports from Congress and two independent counsels. AIM asserts that the consistent entry on Dr. Haut's report was the product of an alternation. . . . Without more, however, [there is] hardly "compelling evidence" that any government actor has behaved illegally. At least while completing that part of the report, Dr. Haut presumably thought "head" correct. . . .
>
> When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or independent counsel inquiries got anything wrong regarding Foster's wounds. The Starr report is altogether credible in its assertion that the photos are "[s]ome of the best evidence" of the nature of Foster's wounds . . . and those who have viewed them have concluded

> that Foster suffered an entrance wound in the mouth and an exit wound in the back of the head. The likelihood that the photos contradict the statements of all four investigating agencies [i.e., the Park Service, the FBI, Congress, and the OIC] seems remote. While we agree that falsification by the agencies would show government illegality . . . there is no persuasive evidence of such falsification, much less compelling evidence.

AIM, 194 F.3d at 124. I agree.

III. CONCLUSION

The description in the OIC's Vaughn index of the ten post-mortem Polaroid photographs at issue is sufficiently detailed for the district court to resolve the issues in this case. Consequently, remand for in camera review is unnecessary.

Moreover, I am persuaded that the public's interest in the OIC's two investigations of Vincent Foster's death is more than adequately served by the release of the 118 photographs that Favish has already obtained from the OIC, the photograph of Foster's eyeglasses that the district court ordered released to him, and the photograph of Foster's right hand clutching the gun that I believe should be released to him as well. The public's interest in disclosure of the remaining nine, never-before-released post-mortem Polaroid photographs does not outweigh the privacy interests of Vincent Foster's surviving family in their nondisclosure. Accordingly, under FOIA's Exemption 7(C), the government has established that their production could reasonably be expected to constitute an "invasion of privacy [that] is 'unwarranted.'" *Reporters Comm.*, 489 U.S. at 780, 109 S. Ct. 1468.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 97-1479-WDK

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANTS

Jan. 11, 2001

KELLER, J.

PROCEEDINGS

The context of this summary judgment ruling is informed by the underlying decision of the Circuit as found at 217 F.3d 1168. The decision requires a review in lieu of affidavits. And, the decision to release is to be determined by balancing the respective interests of the public and the survivors. In this case, the appellate court appears to have defined the zone of privacy protection as those photographs that are "graphic, explicit and extremely upsetting." See the decision at page 1174.

Having the foregoing in mind and following review of the photographs in issue as identified in the Notice of Submission Under Seal of 10 Original Polaroid Pictures to Court for Court's In Camera, Ex-Parte Examination,

which was filed January 9, 2001, the Court focuses on the first five Polaroids set forth in Exhibit 2 to the Notice and concludes as follows:

- The photograph identified as "3—VF's body looking down from top of berm" must be released, as the photograph is not so explicit as to overcome the public interest.
- The photograph identified as "4—VF's body—focusing on face" is an absolute intrusion into the zone of privacy of the survivors, and as such is not discoverable.
- The photograph entitled "5—VF's body—focusing on Rt. side shoulder/arm" is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.

As regards the balance of the photographs referenced at page 46 of the exhibit to the notice, the Court rules as follows:

- The photograph entitled "1—Right hand showing gun & thumb in guard" is discoverable as it may be probative of the public's right to know.
- The photograph entitled "3—VF's body taken from below feet" is not discoverable as it does invade the zone of privacy.
- The photograph entitled "4—VF's body focusing on right side and arm" is discoverable.
- The photograph entitled "5—VF's body—focus on top of head thru heavy foliage" is discoverable.

- The photograph entitled "6—VF's body—focus on head and upper torso" is so explicit as to violate the privacy of the survivors and is not discoverable.
- The photograph entitled "7—VF's face—looking directly down into face" is again so explicit as to be clearly in violation of the survivors' privacy.
- The photograph entitled "8—VF's face—Taken from right side focusing on face & blood on shoulder" is again so explicit as to be not discoverable as it clearly violates the privacy of the survivors.

Accordingly, summary judgment is entered in favor of the OIC with respect to photograph # 4 from the top section of the exhibit list and photographs # 3, # 6, # 7 and # 8 identified in the bottom section of the exhibit list. Absent an appeal, the photographs must be provided to the plaintiff's counsel within 60 days [see Federal Rules of Appellate Procedure, Rule 4(a)(1)(B)] of this order. In the event neither party chooses to appeal, the photographs will be provided within 10 days of such determination. In the event of an appeal, the photographs subject to the appeal will remain under seal until such time as there is a final decision by the Court of Appeals.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 97-1479-WDK

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANTS

Mar. 11, 1998

KELLER, J.

PROCEEDINGS

Before the Court are the parties' Cross Motions for Summary Judgment. The Court issued a preliminary ruling and held a hearing on this matter. The following is a clarification of the Court's final ruling, which was given orally at the hearing.

BACKGROUND

On January 6, 1997, Plaintiff Allan J. Favish sent to Defendant Office of Independent Counsel ("OIC") a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522.

Plaintiff's request sought photographs taken in connection with the investigation into the death of

Deputy White House Counsel Vincent Foster. On January 24, 1997, the OIC denied Plaintiff's request, asserting: (1) Exemption (b)(7)(A), which exempts from disclosure law enforcement information whose disclosure could interfere with enforcement proceedings [5 U.S.C. § 552(b)(7)(A)]; and (2) Exemption (b)(7)(C), which exempts from disclosure law enforcement information whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" [5 U.S.C. § 552(b)(7)(C)]. The OIC also reserved the right to assert other relevant exemptions, Plaintiff administratively appealed the OIC's decision, and the appeal was denied on February 19, 1997.

On March 6, 1997, Plaintiff filed the present "Complaint for Injunctive Relief Under the Freedom of Information Act." On October 10, 1997, the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing, Independent Counsels (the "Special Division"), permitted the OIC report on the death of Vincent Foster to be released to the public. Following the release of this report, the OIC reviewed the photographs sought by Plaintiff and modified its response. As a result, the OIC withdrew its assertion of Exemption (b)(7)(A), but still asserted Exemption (b)(7)(C). Additionally, the OIC asserted Exemption (b)(3), which exempts from disclosure matters that are specifically exempted from disclosure by a separate statute, 5 U.S.C. § 552(b)(3).

On February 12, 1998, the Court entered the parties' "Stipulation to Dismiss With Prejudice Claims As To Information Withheld Pursuant to Exemption (b)(3) and Claims As To Certain Information Withheld Pur-

suant to (b)(7)(C) and Identification of What Remains At Issue." In that stipulation the parties dismissed with prejudice Plaintiff's claims regarding all photographs withheld pursuant to Exemption (b)(3. Stipulation, at 1:26-2:12. The parties also dismissed with prejudice Plaintiff's claims regarding certain photographs withheld pursuant to Exemption (b)(7)(C). Stipulation, at 2:4-12. The stipulation also identified the documents that Plaintiff still seeks. Plaintiff still seeks 11 Polaroid photographs, including 9 post-mortem photographs of Foster's body in Fort Marcy Park, 1 post-mortem photograph of Foster's right hand holding a gun, and 1 photograph of Foster's eyeglasses lying on the ground at Fort Marcy Park. Stipulation, at 2: 13-19; Defendant's Motion for Summary Judgment, at 20:19– 21:13.

The stipulation also stated that Defendant still asserts Exemption (b)(7)(C) to withhold the 11 photographs. The parties stipulated that the remaining 11 photographs were "compiled for law enforcement uses," the threshold requirement for Exemption (b)(7)(C). Stipulation, at 2:19-22. The parties stated that "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25. In addition, the parties noted that Plaintiff claims that Defendant is required to produce color copies of the unredacted photographs already released to Plaintiff in black and white. Stipulation, at 2:25–3.1

On February 11, 1998, Plaintiff filed the present motion for summary adjudication of issues, seeking an order that (1) release of the eleven remaining photo-

graphs will not result in an unwarranted invasion of the privacy of Vincent Foster's surviving family members; and (2) release of color copies of the photographs already received is required by FOIA. On February 13, 1998, Defendant filed the present motion for summary judgment, claiming that no genuine issue of material fact exists with regard to the claimed exemption and that Defendant is entitled to judgment as a matter of law.

DISCUSSION

I. Cross Motions For Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. All reasonable inferences are granted in favor of the non-moving party, however, the non-moving party must provide specific facts showing that there are genuine issues for trial, Fed. R. Civ. P. 56(e); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-25 (1986). When "the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In deciding a motion for summary judgment, the court must "determine whether the 'specific facts' set forth by the non-moving party, coupled with the undisputed background or contextual facts, are such that a reasonable jury might return a verdict in its favor based on the evidence," *T.W. Serv., Inc* v. *Pacific*

Elec. Contractors Ass'n., 809 F.2d 626, 631 (9th Cir. 1987). A "party opposing summary judgment may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." *Leer* v. *Murphy*, 844 F.2d 628, 631 (9th Cir. 1988). A "mere scintilla of evidence" is insufficient to oppose a summary judgment motion under Rule 56. *Anderson* v. *Liberty Lobby Co.*, 477 U.S. 242, 252 (1986).

B. Eleven Remaining Contested Photographs: Privacy Exemption Under 5 U.S.C. § 552(b)(7)(C)

Exemption (b)(7)(c) exempts from disclosure "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The parties have stipulated that the remaining 11 photographs were compiled for law enforcement purposes. Stipulation, at 2:19-22. Thus, as the parties recognize, "[t]he only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy." Stipulation, at 2:22-25.

1. Privacy Interest of Foster's Surving Family Members

The parties take opposite positions on the question of whether Foster's surviving family members have a privacy interest in the withheld photos. Defendant claims that the family members' privacy interests exist and of the 11 photographs. Defendant claims that the photographs sought by Plaintiff are "graphic, explicit, and extremely upsetting." Defendant's Motion, at 22. Defendant further claims that disclosure of these 11 photographs can reasonably be expected to cause the

surviving Foster family members anguish beyond that which they have already suffered, thus constituting an invasion of their personal privacy. Joseph Declaration, ¶¶ 15, 17. Plaintiff asserts that the concern argued by the OIC is not for the "privacy" of the Foster family members, which is protected by Exemption (b)(7)(C), but rather is an argument for a "family grief" exemption to FOIA which does not exist.

In support of its privacy argument, Defendant points to several cases which recognize such a privacy interest in surviving family members, including *New York Times Co.* v. *National Aeronautics and Space Administration*, 782 F. Supp. 628 (D.D.C. 1991). In New York Times, a reporter submitted a FOIA request to NASA seeking a copy of the voice communications tape recorded aboard the space shuttle Challenger prior to its explosion on January 28, 1986. *Id.* at 630. NASA provided the transcripts of the tape, but denied the request for a copy of the tape itself, claiming the privacy exemption under § 552(b)(6) ("Exemption (b)(6)")[1] *Id.* The district court found that the astronauts' families

[1] Exemption (b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Since the exemption argued in this case exempts records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the standards for determining whether each exemption applies obviously differ. However, both exemptions involve privacy interests, and there is no apparent difference in the privacy interests that may be recognized by the two exemptions. Therefore, the cases discussing the more stringent (b)(6) privacy standard are applicable to this Court's determination of whether the interest asserted by the OIC is a privacy interest recognized by Exemption (b)(7)(C).

had a "valid and substantial" privacy interest against disclosures which would cause them to suffer additional anguish. *Id.* at 631. The court stated that the privacy interest included "reasonable expectations of undisturbed enjoyment in the solitude and seclusion of one's own home." *Id.* at 631-632 (citation omitted). The court noted that exposure to the voice of a deceased family member would cause the Challenger families pain and that the Challenger families would face a disruptive assault on their privacy if the tape were disclosed, because of the notoriety surrounding the accident. *Id.* at 631-632. The court found that this potential invasion of privacy outweighed the public interest in the disclosure of the tape. *Id.* at 633.

The court in *New York Times* cited *Badhwar* v. *United States Department of the Air Force*, 829 F.2d 182 (D.C. Cir. 1987), as another court that recognized privacy interests of relatives in various records of deceased family members. *New York Times*, 782 F. Supp. at 631. In *Badhwar*, the D.C. Circuit remanded for the district court to determine whether disclosure of a portion of an autopsy report would constitute a "clearly unwarranted invasion of personal privacy," because of the possibility that it would "shock the sensibilities of surviving kin." *Badhwar*, 829 F.2d at 186. In doing so, the court implicitly but necessarily recognized that such a privacy interest existed and remanded to determine whether the disclosure sought would impact that interest. *Id.*

Another district court has recognized this family privacy interest with regard to the Foster family members whose privacy is sought to be protected in the present case. *See Dow Jones & Co.* v. *United States*

Department of Justice, 88 F Supp. 145, 152 (S.D.N.Y. 1995). In *Dow Jones*, the court allowed the disclosure of an allegedly forged note found in Vincent Foster's briefcase. In doing so, the court recognized that the Foster privacy interest that would be impinged by the pain and anguish that would accompany the renewed scrutiny resulting from disclosure of the note. *Id.* The court allowed disclosure because it found that this privacy interest would be outweighed by the substantial public interest in viewing the note. *Id.*

Defendant also cites several cases which implicitly recognize such a privacy interest in the relatives of the deceased. See *Hale* v. *United States Department of Justice*, 973 F.2d 894, 902 (10th Cir. 1992) (finding that Exemption (b)(7)(C) applied to exempt from disclosure photographs of a deceased victim, because no public interest could be discerned "that would outweigh the personal privacy interests of the victim's family"), *vacated on other grounds*, 509 U.S. 918 (1993)[8]; *Katz* v. *National Archives & Records Administration*, 862 F. Supp. 476, 473 (D.D.C. 1994) (accepting as undisputed that the Kennedy family has a privacy interest in the autopsy records of President Kennedy, limited to preventing public disclosure that would cause clearly unwarranted anguish or grief), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir 1995); *Bowen* v. *U.S. Food and Drug Administration*, 925 F.2d 1125 (9th Cir. 1990)

[8] The Tenth Circuit's decision in *Hale* was vacated and remanded for reasons unrelated to Exemption (b)(7)(C) [*Hale* v. *United States Department of Justice*, 509 U.S. 918 (1993)], but Plaintiff conceded that the Tenth Circuit implicitly reinstated the portion of the opinion discussing Exemption (b)(7)(C) on remand [*Hale* v. *United States Department of Justice*, 2 F.3d 1066, 1067-68 (10th Cir. 1993)]. Plaintiff's Reply, at 7:4-5.

(holding that the FDA properly withheld medical records and autopsy reports under the (b)(6) privacy exemption, thereby necessarily recognizing a privacy interest belonging to others in documents relating to a deceased family member, at least with regard to the autopsy reports); *Outlaw* v. *United States Department of the Army*, 815 F. Supp. 505, 506 (D.D.C. 1993) (finding that the deceased's family members' privacy interest was "not substantial" and was outweighed by the public interest in disclosure).

Plaintiff assails this collection of persuasive authority by arguing that many of these cases did not expressly hold that such a privacy interest exists and by arguing that the courts that recognized such an interest did so "by making their own law" in contravention of the Supreme Court's definition of privacy. Plaintiff's Motion, at 4:23. Plaintiff cites the Third Circuit's definition of "privacy" in the *United States* v. *Westinghouse Electric Corp.*, 638 F.2d 570, 577 n.5 (3rd Cir. 1980) (quoting Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968)), as "control over knowledge about oneself." Plaintiff argues that the Supreme Court agreed with this definition in *United States Department of Justice* v. *Reporters Committee*, 489 U.S. 749, 762-63 (1989), when it stated: "To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." The Court in Reporters Committee also stated:

> "As we have pointed out before, '[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personnel matters, and another is the

interest in independence in making certain kinds of important decisions.'"

Id. at 762 (citation omitted).

However, neither this passage nor footnote 5 purports to define the full contours of "privacy" as that term is understood in the FOIA privacy exemptions. Therefore, Plaintiff's argument that all of the foregoing authority is contrary to Supreme Court precedent must be rejected. While the courts in *New York Times*, *Badhwar*, *Dow Jones*, *Hale* and *Katz* may have extended the definition of "privacy" in exempting their respective documents from disclosure, these extensions did not occur in the face of contrary Supreme Court precedent. The Court finds that Foster's surviving family members possess personal interests that could be infringed by the disclosure of the 11 photographs still at issue. Accordingly, the OIC's assertion of Exemption (b)(7)(C) does not fail for lack of a privacy interest.

2. Public Interest in Disclosure

Plaintiff argues that, even if the surviving family members have a privacy interest in the nondisclosure of the 11 photographs, this privacy interest is outweighed by the public interest in their disclosure. In determining the applicability of Exemption (b)(7)(C), the Court must balance the public interest in disclosure against the possible invasion of privacy caused by the disclosure. *Reporters Committee*, 489 U.S. at 776; *Schiffer* v. *Federal Bureau of Investigation*, 78 F.3d 1405, 1409 (9th Cir. 1996). The government bears the burden of establishing that privacy interests outweigh

the public's interests in disclosure. *Schiffer*, 78 F.3d at 1409-1410.

Defendant claims that Plaintiff has not established that a public interest in disclosure exists. Defendant correctly noted that a public interest cognizable under FOIA is informing the citizenry about how the government is performing its statutory duties. Defendant's Reply, at 13:8-10 (citing *Reporter's Committee*, 489 U.S. at 733). See also *Hunt* v. *Federal Bureau of Investigation*, 972 F.2d 286, 289-90 (9th Cir. 1992) (discussing the "public interest in ensuring the integrity and the reliability of government investigation procedures"). Defendant argues that none of the 11 photographs at issue have any bearing upon how Vincent Foster performed his duties as Deputy Counsel to the President. Defendant's Reply, at 13:11-13. From this, Defendant argues that Plaintiff merely demonstrates "curiosity" in the photographs, not a cognizable public interest.

However, it is clear that the public interest Plaintiff attempts to identify is not a concern for how Vincent Foster performed his duties. Rather, Plaintiff's concerns appear to be for the circumstances surrounding Foster's death and for the OIC's investigation of that death. Pages 9-33 of Plaintiff's Motion for Summary Adjudication attack the government investigations of Foster's death (as conducted by Independent Counsels Robert Fiske and Kenneth Star) as "grossly incomplete and untrustworthy." These pages attempt to raise several questions, contradictions, and inconsistencies with regard to what the public was told regarding: (1) the extent of Foster's injuries; (2) the statements made by Starr's [sic] family regarding the gun allegedly found in Foster's hand; (2) [sic] the condition of Foster's

body as it was found; (4) the condition and location of Foster's eyeglasses; (5) the circumstances surrounding Foster's autopsy; and (6) the condition of the death scene. Plaintiff's Motion, at 9-33. Plaintiff's allegations question the manner in which the OIC investigated Foster's death and implicitly question the manner in which Foster died as well. Thus, the public interest asserted by Plaintiff clearly involves the question of how the OIC performed its statutory duties, not how Vincent Foster performed his duties.

3. Balancing the Privacy Interest with the Public Interest in Disclosure

The issue remains, however, of whether the privacy interests of Foster's family members outweigh the interest in ensuring the integrity and reliabilty of the OIC's investigation procedures. There is no doubt that the public interest in ensuring that the OIC conducted a proper and thorough investigation is substantial. However, this interest is lessened because of the exhaustive investigation that has already occurred regarding Foster's death. Five government inquiries have determined that Vincent Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993. The United States Park Policy initially investigated the death and conducted another investigation under the direction of Independent Counsel Robert Fiske. Report on the Death of Vincent W. Foster, Jr.. by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association ("Exhibit A to Defendant's Opposition") at 2. Congress conducted two inquiries which reached the same conclusion. *Id.* Finally, the OIC reached the same conclusion in its report that was recently ordered to be released to the

public. *Id.* at 114. In addition to these investigations. Foster's death has been subject to intense media scrutiny, as evidenced by the several news sources mentioned by both parties in their briefing. For these reasons, the public interest in investigation of Foster's death is not as strong as it was prior to the extensive examination it has already received.

Additionally, the Court is not convinced that the disclosure of these 11 photographs will serve the asserted public interest. Plaintiff has not sufficiently explained how the disclosure of these photographs will advance his investigation into Foster's death. Nor has he sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the OIC investigation. Due to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family members outweigh the public interest in disclosure. *See Katz*, 862 F. Supp. 484-486 (finding that the Kennedy family members' interests in preventing the disclosure of President Kennedy's autopsy photos and x-rays outweighed the public interest in their disclosure, because, *inter alia*, "the records had already been reviewed by a number of government entities and private researchers"); *New York Times*, 82 F. Supp. at 633 (finding that the Challenger families' privacy interest outweighed the public interest in disclosure).

Based on the foregoing, the Court finds that summary judgment is appropriate in favor of the OIC, with one exception. The Court finds that the privacy interests in the nondisclosure of the photographs of Foster's eyeglasses are not as strong as the privacy interests in the nondisclosure of the other ten photo-

graphs. Thus, the balancing tips in favor of the public interests with regard to this photograph. Accordingly, the OIC is required to produce the photograph of Foster's eyeglasses within 90 days.

C. Photographs Already Produced: Color Copies

With regard to the photographs that have been released, Plaintiff objects to the OIC's "redaction of the color from the photographs." Plaintiff argues that he originally requested color copies of the photographs, but has received only black and white copies. Plaintiff argues that the OIC has not cited and cannot cite any FOIA exemption which allows it to redact the color from these photographs.

Defendant counters that it is not required to provide color copies of color photographs, Defendant argues that the version of FOIA that was effective at the time of Plaintiff's request requires only that agencies make records promptly available upon a proper request. 5 U.S.C. § 552(a)(3). Defendant argues that § 552 at that time did not impose a requirement of providing color copies of color photographs. Defendant claims that Plaintiff was provided with the best photocopy available.

However, a new subsection of § 552 became effective in April of 1997. That subsection states: "In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(A)(3)(B). Since this subsection was effective in January of 1998, when the OIC made records available to Plaintiff, it applies to the OIC's disclosures.

Therefore, the issue becomes whether color copies of color photographs are "easily reproducible" by the OIC.

The OIC argues that it is not equipped to make color photocopies and therefore cannot do so without undue burden and interference with its investigatory mandates. The OIC also argues that either engaging an outside contractor to make color copies or allowing plaintiff to make color copies himself would burden the OIC and expose it to the significant risk of leakage of sensitive, non-public material pertaining to its pending criminal investigations, Defendant's Opposition, at 19 n.10.

The problem with this argument is that Plaintiff has offered to pay "the costs of providing the OIC with the appropriate equipment to make suitable copies under circumstances consistent, with the OIC's security needs." Plaintiff's Reply, at 18:12-13. Plaintiff suggests that this offer extends to paying the bill of any source of equipment and personnel that the OIC trusts. *Id.* at 18:13-15. In light of this offer of accommodation, it is difficult to understand how making copies with a color copier in the OIC's offices created any more of a "undue burden" than doing so with the OIC's own black and white copier. As for the risk of leakage, the court does not believe that this risk would be enhanced by a single delivery of a piece of office equipment. In footnote 8 of its Reply, the OIC claims that the Court is to "accord substantial weight to any agency's determination as to . . . reproducibility under [§ 552(a)(3)(B)]." 5 U.S.C. § 552(a)(409B). Even with this deference in mind, the Court cannot accept the arguments advanced by Defendant. Consequently, the Court finds that color

copies are "readily reproducible," and therefore must be provided to Plaintiff within 90 days.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-55487, 01-55788, 01-55789
D.C. No. CV-97-01479-WDK

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF THE INDEPENDENT COUNSEL,
DEFENDANT-APPELLEE

Entered: Aug. 16, 2002

ORDER

Before: PREGERSON, NOONAN AND O'SCANNLAIN, Circuit Judges

The majority of the panel has voted to deny the petitions for rehearing. Judge Pregerson would grant the petitions for rehearing. Judges Pregerson and O'Scannlain have voted to deny suggestions for rehearing en banc and Judge Noonan recommended denying the suggestions for rehearing en banc.

The full court has been advised on the suggestions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are DENIED.

APPENDIX F

1. Section 552, of Title 5, U.S.C., provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

(7) records or information complied for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institute which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

JAN 21 2003

No. 02-954

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY

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BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY

In his petition for certiorari on behalf of the Office of Independent Counsel, the Solicitor General rightly contends that the Ninth Circuit Court of Appeals decisions in this case conflict with decisions of this Court and other Circuits as to important issues regarding Exemption 7(C) of the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"). The Solicitor General also contends that two of the three questions presented by the Foster family's petition for certiorari from the same Ninth Circuit decisions warrant certiorari (No. 02-599). While we agree with most of what the Solicitor General says, we disagree with him in two respects.

1. The Solicitor General asks that the petitions for certiorari be held pending this Court's decision in *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. City of Chicago*, No. 02-322 ("*ATF*"), on the ground that this case and *ATF* both involve "an analysis of the public interest under [FOIA] Exemption 7(C) and how it should be weighed against the privacy interest in material withheld under that Exemption." Petition at 7.

However, this case and *ATF* present very different aspects of the public interest analysis under Exemption 7(C). In *ATF*, the City of Chicago is seeking government information in order to further its suit in state court against gun manufacturers, in which the City alleges that the manufacturers' marketing practices have facilitated violations of the City's firearms ordinances. The Solicitor General does not challenge the City's assertion that the records would assist its state court suit; instead, he argues that the only relevant public interest under Exemption 7(C) is the public's interest "in evaluating the conduct of the federal government," and that this interest is not furthered by the

City's lawsuit against the gun manufacturers. Petition (No. 02-322) at 17-18.

In the present case, conspiracy theorist Alan Favish is seeking government information to support his contention that the several investigations of Vince Foster's death, all of which concluded that he committed suicide, came to the wrong conclusion, and that the last investigation conducted by Judge Starr was "grossly incomplete and untrustworthy." Petition App. (No. 02-954) at 38. If his allegations were at all plausible (and they are not), they would indicate a public interest in evaluating the conduct of the federal government.

Thus a central issue presented in this case (but not in *ATF*) is whether a federal court reviewing a FOIA request has an obligation to weigh allegations of government misfeasance before concluding that they warrant overriding a privacy interest in government law enforcement records. As the Solicitor General correctly points out, by holding that "bald allegations of governmental misconduct" are sufficient to override a privacy interest, the Ninth Circuit is in conflict with the D.C. and Fourth Circuits and with this Court's decision in *United States Dep't of State v. Ray*, 502 U.S. 164 (1991). Petition at 9-11. This is an important issue, and there is no reason to believe that it will be resolved by *ATF*, which does not involve a claim of governmental misconduct.[1]

To summarize the above, while the City of Chicago's allegations of public interest are plausible and do not require further substantiation, they are not relevant to the public

[1] In his brief in *Oguaju v. United States Marshals Service*, No. 02-5651, the Solicitor General admits that "the public interests asserted in *ATF v. City of Chicago* . . . do not involve an allegation of governmental misconduct." (p. 4).

interest in evaluating the federal government's conduct. By contrast, while Favish's allegations would (if substantial) implicate the public interest in evaluating the federal government's conduct, they are implausible, lack any substantiation, and thus raise the issue as to the degree of evidence required to demonstrate that there is a public interest that outweighs privacy interests. The cases are different, and a decision in *ATF* is not likely to control here.

Moreover, as the Solicitor General points out, the court of appeals in this case erred in holding that the multiple, lengthy investigations that already had taken place and the enormous volume of materials (including photographs) concerning Foster's death already in the public domain are irrelevant to determining what public interest there is in disclosure of the photographs at issue. Petition at 15. As the Solicitor General observes, the Ninth Circuit's opinion in this regard is in conflict with the Fifth, Seventh and D.C. Circuits and with this Court's opinion in *United States Dep't of State v. Ray*, 502 U.S. 164 (1991). Petition at 15-17. Nothing in *ATF* touches this issue, which is important and needs to be resolved.

There is only one issue common to this case and *ATF* -- whether a nexus must be shown between the claimed public interest and the records sought. In the *ATF* petition, the Solicitor General, in answering the Seventh Circuit's statement that the request for records served the public interest in the ATF's performance of its duties, noted that the court had not explained how the records sought would achieve that purpose. *ATF* Petition (No. 02-322) at 18. In the present case, both our petition and the Solicitor General's pointed out that no nexus has been shown between Favish's assertion of governmental misconduct and the photographs the court of appeals ordered to be released. Petition (No. 02-954) at 11-14; Petition (No. 02-599) at 12-14.

However, even if *ATF* resolves the nexus issue there presented, that will not resolve this case. If the Ninth Circuit adheres to the position that the photographs it ordered released do not implicate a privacy interest, then Favish will not have to demonstrate that they have a nexus to the public interest; a balancing of the public interest against the privacy interest is required only if a privacy interest is implicated[2] and, if it is not, release is required unless some other FOIA exemption applies. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988). Thus a remand of this case in light of a decision in *ATF* on the nexus issue promises to be a meaningless exercise, which likely will impose yet another year or more of burdensome litigation costs on the Foster family with no tangible result, and which will bring this case back to this Court with both the public interest and privacy issues still unresolved.

2. The petition for certiorari filed by Mr. Foster's sister and widow (No. 02-599) raises the issue of whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" does not invade the survivors' privacy. That issue is not presented by *ATF*, which does not concern in any way the survivors' privacy interest. The Solicitor General argues that the court of appeals' decision contains no explicit holding on this issue. Brief for the Federal Respondent (No. 02-599) at 5. In our reply brief in No. 02-599, we observed that the record shows that the court of appeals must have agreed with the district court's clear (and erroneous) holding that only items that are "graphic, explicit, and extremely upsetting" give rise to a survivor privacy

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[2] The Solicitor General recognizes that, if the case is remanded, the Ninth Circuit will have to consider the privacy issue. Brief for the Federal Respondent (No. 02-599) at 7.

interest. Moreover, as noted above, if the court of appeals' decision rejecting a privacy interest in these photographs is undisturbed, then the public interest issues on which the Foster family and the Solicitor General seek certiorari will not be reached. That is because, if no privacy interest is implicated, the FOIA requires release unless some other exemption applies, without any examination of public interest concerns. *United States Dep't of Justice v. Tax Analysts, supra*; *United States Dep't of Justice v. Julian, supra*. We thus strongly disagree with the Solicitor General's conclusion that *ATF*, which does not present the survivor privacy issue, should govern this case.

CONCLUSION

The petition for a writ of certiorari should be granted rather than held.

Respectfully submitted,

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January, 2003

MAR 21 2003

Nos. 02-599, 02-954

IN THE

Supreme Court of the United States

SHEILA FOSTER ANTHONY, LISA FOSTER MOODY,
Petitioners

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

OFFICE OF INDEPENDENT COUNSEL,
Petitioner

v.

ALLAN J. FAVISH, ET. AL.,
Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit committed reversible error by holding that Exemption 7(C) of the Freedom of Information Act did not allow the Office of Independent Counsel to withhold four original Polaroid photographs of Deputy White House Counsel Vincent Foster's deceased body.

PARTIES TO THE PROCEEDING

The petitioners are the Office of Independent Counsel, who was the defendant below, and Sheila Foster Anthony and Lisa Foster Moody, who intervened in the district court to prevent release of the photographs. The respondent is Allan J. Favish, who was the plaintiff below, and who has filed his own petition for writ of certiorari in this case, *Allan J. Favish v. OIC, et al.*, No. 02-409.

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FAVISH'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Allan J. Favish filed a lawsuit under the FOIA against Petitioner Office of Independent Counsel ("OIC") to obtain certain original photographs taken in connection with the investigation of the July 20, 1993 death of Deputy White House Counsel Vincent Foster ("Foster"). The OIC withheld photographs of Foster's body taken in Virginia's Fort Marcy Park on the basis of the "personal privacy" exemption in the FOIA, 5 U.S.C. § 552(b)(7)(C).

Later, Petitioners Sheila Foster Anthony and Lisa Foster Moody ("intervenors") intervened in the district court to prevent release of the photographs.

The district court entered its first summary judgment against Favish March 11, 1998, without viewing the original photographs in camera. Intervenors' Appendix., 45.

On July 12, 2000, in deciding the first appeal in this case, the Ninth Circuit reversed and remanded, and ordered the district court to view the photographs in camera. Intervenors' App., 8. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Intervenors' App., 16. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the

Foster family against the public benefit to be obtained by their release." Intervenors' App., 17.

Applying the Ninth Circuit's interpretation of the "personal privacy" exemption, on January 12, 2001, the district court entered a summary judgment ordering the OIC to release five of the ten disputed photographs and allowing the OIC to withhold the other five. Intervenors' App., 5.

On June 6, 2002, without discussion, the Ninth Circuit affirmed the summary judgment, except that it ordered an additional photograph withheld. Intervenors' App., 1. Contrary to intervenors' statement that the Ninth Circuit did this "[a]fter in camera review of the photographs,"[1] there is nothing in the record establishing that the original photographs were delivered to the Ninth Circuit, only copies.

On August 16, 2002, the Ninth Circuit denied the OIC's and the intervenors' petitions for rehearing and suggestions for rehearing en banc. Intervenors' App., 4.

REASONS FOR DENYING THE WRITS

1. The Intervenors' Arguments Do Not Justify Granting Their Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The Intervenors' Petition.

The intervenors state that there are "three issues under the FOIA privacy exemption" raised by the Ninth Circuit's opinion that warrant granting of their petition.[2] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[3] The D.C. Circuit stated in *Accuracy in Media v. National Park Service*:

> To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence."[4]

[1] Intervenors' Petition for Writ of Certiorari 6 ("Intervenors' Pet.").
[2] Intervenors' Pet. 6-8.
[3] Intervenors' Pet. 6-7.

That is not the standard in the Ninth Circuit and it is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an "unwarranted" invasion of personal privacy. The exemption does not say anything about having to produce "compelling evidence" in order to make the invasion "warranted" or that it must be evidence of "illegal activity" in order to make the invasion "warranted." This Court has held that the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure.[5]

By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular document is paramount to the privacy interest of a single person or a few persons, the D.C. Circuit gave the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The D.C. Circuit never explained how its standard is consistent with the FOIA as interpreted by this Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

The Ninth Circuit did not err by failing to impose the erroneous standard used by the D.C. Circuit in *AIM*. The D.C. Circuit's improper standard was a good reason for this Court to have granted certiorari in *AIM*, but it did not do so. The Ninth Circuit's obedience to the FOIA in this regard does not provide a good reason for this Court to grant the

[4] *AIM*, 194 F.3d 120, 124 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).
[5] *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984 (9th Cir. 1985) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 1598-99, 48 L.Ed.2d 11 (1976)).

intervenors' petition. The best time to grant certiorari over this issue is when the D.C. Circuit or some other Circuit imposes this erroneous standard again.

Moreover, the intervenors have jumbled cases together that do not use this erroneous standard with those cases that do.[6] Cases holding that a "general interest"[7] in finding the truth, or "mere speculation"[8] or a "broad unsupported statement of possible neglect,"[9] or "merely stating that [a public] interest exists in the abstract,"[10] or "broad unsupported hints of a government coverup"[11] are insufficient, are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or mere speculation or an unsupported statement of possible neglect or anything similar. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[12] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the intervenors' statement that Favish is "a conspiracy theorist,"[13] compelling evidence was presented to the district court and to the Ninth Circuit establishing that the

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[6] Intervenors' Pet. 9-11.

[7] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).

[8] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991).

[9] *See e.g., KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).

[10] *See e.g., Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989).

[11] *See e.g., Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981).

[12] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[13] Intervenors' Pet. 2.

OIC's reports about Foster's death are untrustworthy and deceptive. The OIC was unable to prove that Favish distorted the evidence and unable to provide plausible answers to the questions raised that would diminish the public's interest in disclosure of the photographs.

B. The Ninth Circuit Required A Nexus Between The Public Interest And The Specific Photographs.

The intervenors state that the Ninth Circuit "fail[ed] to require a nexus between the photographs it ordered released and the alleged public interest . . . ."[14] This is false. The Ninth Circuit ordered the district court to "examine the photos in camera and to balance the effect of their release on the privacy of the Foster family against *the public benefit to be obtained by their release*."[15] The phrase "their release" refers to the subject photographs. Therefore, the Ninth Circuit did not abandon a connection between the subject photographs and their ability to serve the purpose of the FOIA, namely, "to shed light 'on an agency's performance of its statutory duties."[16]

The intervenors then make a factual argument, citing dissenting Judge Pregerson, that "with one exception, the photographs would shed no light on any of the claimed inconsistencies in the Report."[17]

However, the factual issue of what the photographs would reveal about how the OIC performed its job is not a sufficient basis for the intervenors' petition. Supreme Court Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Therefore, even if Judges Noonan and

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[14] Intervenors' Pet. 13.

[15] *Favish*, 217 F.3d at 1174 (emphasis added).

[16] *Id.* at 1171 (*quoting United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)).

[17] Intervenors' Pet. 12.

O'Scanlain made an erroneous factual finding about what the photographs reveal, that should not be grounds for granting the intervenors' petition.

Additionally, the intervenors' factual argument is entirely based on Judge Pregerson's dissenting opinion and characterization of the evidence,[18] not the evidence. The intervenors are asking this Court to share its view that Judge Pregerson's dissenting opinion was a factually accurate, fair and logical presentation of the factual issues raised by Favish. In fact, Judge Pregerson's opinion was so deficient that Judge's Noonan and O'Scanlain did not join in it. The intervenors have failed to establish that Judge's Noonan and O'Scanlain made any factual error regarding what the photographs reveal about how the OIC conducted its job.

The intervenors take an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The intervenors made it sound as if the only reason to see the photos is to examine "the location of Mr. Foster's entrance and exit wounds."[19]

In fact, the reason the public needs to see these photos is that the government's presentation of the evidence in its reports is demonstrably untrustworthy and deceptive. The government destroyed its own credibility with regard to this case. The photos may or may not reveal information contradicting the suicide story. The point however, is that the public must be allowed to make that determination for itself in the face of untrustworthy government reports.

The intervenors argue as if there is no relationship between the four photos ordered released and the public's interest in evaluating how the OIC did its job.[20] However, there is such a relationship. Although the Ninth Circuit and the district court did not articulate that relationship, that

[18] Intervenors' Pet. 12-13.
[19] Intervenors' Pet. 12; *see also id.* 13.
[20] Intervenors' Pet. 12-14.

relationship was in the record before both courts, and presumably was taken into account by them.

i. The Leaked Gun-In-Hand Photo.

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.[21] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun.[22] The publicly available "leaked" copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt.[23] Starr quotes Lee as saying that this "backspatter" is typical.[24] The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun while sitting on the ground, how did it get under his leg? The original photo will provide a more detailed view

[21] Excerpts of Record 410 (filed in appeal 2, May 30, 2001) ("ER"). The photo is at ER 178 & 179.
[22] ER 610-611, 616, 620.
[23] ER 616, 621.
[24] ER 616, 621.

and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded public version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the public version far greater exposure than Favish could ever give any version he might receive.

ii. The Photograph Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm".

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released.[25] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[26] This photo also may help solve the mystery about blood flow patterns and an alleged neck wound that officially did not exist.

As Starr stated, paramedic Richard Arthur, "initially said he saw what 'appeared to be a bullet wound, an entrance wound' on the neck."[27] Unstated by Starr is that Arthur testified he was 2-3 feet away from Foster when he observed the apparent bullet neck wound on the right side of Foster's neck, around the jaw line and underneath the right ear.[28] But, citing a nonpublic FBI report, Starr said that Arthur told the FBI in 1996 that autopsy photos Arthur examined were taken from a better angle and a better view than what he had at the park and he may have been mistaken about such a wound.[29]

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[25] ER 409.
[26] ER 482.
[27] ER 277, 314-15.
[28] ER 119-20, 122-23.
[29] ER 277, 314-15.

The alleged neck wound also is discussed in two books by major United States publishers.[30] These books allege a story of illegal conduct by members of the OIC and the FBI in trying to prevent proper enlargement and examination of the pristine original of at least one of the six Polaroid photographs not ordered released.[31] Allegedly, this was done to conceal a neck wound that officially did not exist.[32] The books allege an effort to illegally obstruct the work of Assistant United States Attorney Miquel Rodriguez and his former assistant Lucia Rambusch while they were working on the Foster death investigation at the OIC.[33] One of the authors of the two books, Ambrose Evans-Pritchard, stated in a declaration, "I have seen the photograph showing an apparent neck wound to Foster's neck . . . ."[34]

It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an autopsy photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and visible in an enhanced copy of the original photo.[35]

Moreover, Starr discussed blood draining from Foster's "right nostril" and "right side of the mouth."[36] Starr stated

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[30] ER 423-430 (Christopher Ruddy, The Strange Death of Vincent Foster: An Investigation 163-165 (The Free Press, a division of Simon & Schuster, Inc., 1997)); ER 423, 431-453 (Ambrose Evans-Pritchard, The Secret Life of Bill Clinton: The Unreported Stories 135-153 (Regnery Publishing, Inc., 1997)).
[31] *Id.*
[32] *Id.*
[33] *Id.* The district court denied Favish's motion to take the testimony of Rodriguez and Rambusch on the issue of the authenticity of the photos being shown to the district court. ER 209, 220-226, 411-473, 713. The Ninth Circuit was asked to reverse that ruling (Opening Brief of Appellant at 4-6, 46-57 (filed in appeal 2, May 30, 2001), but affirmed it without commenting on the ruling. Intervenors' App. 1.
[34] ER 601, 656, 662.
[35] ER 277, 345.
[36] ER 277, 345.

that many witnesses who saw Foster at the scene described his head as "facing virtually straight, not tilting noticeably to one side or the other."[37] Starr also discussed "a blood transfer stain in the area of the right side of the face" that Dr. Lee allegedly concluded was made when Foster's "head made contact with the right shoulder at some point before the Polaroids were taken,"[38] thereby causing a blood stain to transfer from Foster's shoulder to his cheek. Starr was unable to explain how this happened and could only speculate about who might have moved Foster's head because none of the Park Police or paramedics who were among the first to see Foster's body at the scene stated that they moved Foster's head.[39] Neither Fiske or Starr was able to definitively state how Foster's head made contact with his right shoulder and then returned to a straight-up position to leave the transfer stain on his cheek. Starr implied that the blood on Foster's right shoulder came from the blood draining from the nostril and mouth.[40] Thus Starr implied that the blood draining from the nostril and mouth came first and then stained the shoulder, and then the transfer stain was made on the cheek *over* the blood trail from the nostril and mouth.

However, more recently released evidence from Dr. Lee's report for Starr demonstrates that Starr's implied scenario did not happen. The new evidence raises questions about whether the head was moved more than once and whether the blood on the shoulder initially came from a neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck by tilting the head to spill blood from the mouth over the right side of the neck.

According to Lee's report: "A portion of the blood trail from Mr. Foster's mouth appears to have been deposited on

[37] ER 347.
[38] ER 277, 347.
[39] ER 277, 347.
[40] ER 277, 344-347.

top of the transfer pattern after his face was separated from the shoulder region."[41] Starr failed to tell this to the public. Starr led the public to believe that blood drained from Foster's nostril and mouth and stained his shoulder. Then, Starr implies, some unknown person tilted Foster's head so that the right cheek touched the blood on the shoulder and then that person moved Foster's head off the shoulder back to the straight-up position, leaving the transfer stain on the cheek.

Starr did not tell the public that Lee stated that *after* this transfer stain was made, more blood drained from Foster's mouth. How could more blood have drained from Foster's mouth at that point, unless somebody tilted his head again? Presumably his heart had long since stopped beating and at least some of the blood had already drained from his mouth to stain the shoulder.

Starr does not tell us what caused the flow of blood out of Foster's mouth that is described by Lee as going on top of the transfer stain on Foster's cheek. Given Starr's failure to explain this second blood flow, to fit the facts reported by Lee, it appears that one has to assume that the head was moved for a second time. This second movement means that after whomever moved Foster's head the first time, someone (who presumably had no business moving the head of a man known to be dead at a possible crime scene) moved the head with the result that blood streamed down the right side of the head and onto the neck and shoulder. Therefore, we now have possible evidence for a second movement of Foster's head that Starr failed to report.

This leaves the American public in a position of having to make educated guesses with insufficient evidence about what happened. The public should not have to do that. One educated guess is that the shoulder became stained with blood that was draining from a right-side neck wound (that

[41] ER 601, 654-655.

officially did not exist). Then some unknown person moved Foster's head, causing the right cheek to touch the bloodstained right shoulder, thereby creating the transfer stain on the right cheek, and then moved his head back to the straight-up position. Subsequently, somebody moved Foster's head for a second time to the right in order to spill some blood that was collected in the mouth out the right side of the mouth to cover the blood trail that was coming from the neck and make it appear that all the blood was originating from the mouth, and none from the neck.

Such an educated guess is consistent with something else Lee stated that Starr did not tell the public: "A pool of blood appears to be directly under the right side of his neck and shoulder region."[42] Unfortunately, the public is left to this sort of educated guessing because the government has not dealt with the public honestly. We know that Lee told Starr that the contact stain was created before the blood trail from the mouth, implying that they were caused by two separate events. We know that Starr failed to tell this to the public. We also know that neither Lee or Starr offer any explanation of how this happened.

The public must see these photos so that the public can provide the careful analysis that the government failed to provide. Perhaps the photos will show whether the amount of blood that pooled under the right side of the neck and shoulder region, as reported by Lee and concealed by Starr, is too great to have come from the mouth, thus indicating it came from the neck.

We are dealing with a mystery. By nature, we don't know all the answers. We do not know all the right questions to ask. Public release is the only way to ensure that these photos are given the scrutiny they deserve.

iii. The Photograph Entitled "4 – VF's body focusing on right side and arm".

[42] ER 601, 654, 655.

The district court ordered that the photo entitled "4 – VF's body focusing on right side and arm" should be released.[43] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that this photo shows "blood stains and/or blood . . . ."[44] This photo also may help solve the mystery about the blood flow patterns discussed above.

iv. The Photograph Entitled "5 – VF's body – focus on top of head thru heavy foliage".

The district court ordered that the photo entitled "5 – VF's body – focus on top of head thru heavy foliage" should be released.[45] The Ninth Circuit affirmed this ruling. Intervenors' App., 2-3.

In its motion to alter the judgment, the OIC stated that in this photo "Foster's face is clearly visible . . . ."[46] This photo also may help solve the mystery about the blood flow patterns discussed above.

C. The Ninth Circuit Did Not Create A New Universal Standard With Its "Graphic, Explicit, etc." Standard.

The intervenors argue that the Ninth Circuit and the district court's use of the phrase "graphic, explicit and extremely upsetting" constitutes a new test for determining whether a privacy interest is impacted, to be applied in all cases.[47] In so doing, the intervenors misconstrue what the Ninth Circuit and the district court did here. The district court stated: "*In this case*, the appellate court appears to have defined the zone of privacy protection as those photographs that are 'graphic, explicit and extremely upsetting.'" Intervenors' App. 5 (emphasis added). Therefore, the zone of

[43] ER 410.
[44] ER 482.
[45] ER 410.
[46] ER 482.
[47] Intervenors' Pet. 14-17.

privacy protection was only defined for "this case" not all cases.

It must be remembered that in "this case" the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[48] Thus, in that context, a photograph would have to meet the "graphic, explicit and extremely upsetting" standard in order to remain hidden from public view. Neither the Ninth Circuit or the district court was establishing that standard for every future case involving a claim of privacy under Exemption 7(C). Therefore, the Ninth Circuit's opinion is not inconsistent with this Court's opinion in *Reporters Committee*, as argued by the intervenors.[49]

Nor does the Ninth Circuit's use of that standard in this case, based on the facts of this case, conflict with other appellate opinions from other circuits. The different result in the D.C. Circuit's *AIM* case is based more on the judge's different analysis of the facts, rather than the Ninth Circuit's use of the "graphic, explicit and extremely upsetting" standard. Accordingly, the Ninth Circuit's use of that standard is insufficient reason for this Court to grant the intervenors' petition.

2. The OIC's Three Arguments About The Ninth Circuit's Evaluation Of The Public Interest Side Of Exemption 7(C) Balancing Do Not Justify Granting The OIC's Petition.

A. The D.C. Circuit's Use Of An Incorrect Standard Does Not Justify Granting The OIC's Petition.

The OIC states that there are "[t]hree aspects of the Ninth Circuit's evaluation of the public interest side of the

[48] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[49] Intervenors' Pet. 16.

balance under Exemption 7(C)" that "warrant certiorari."[50] The first of these is that the Ninth Circuit and the D.C. Circuit have different standards for evaluating the public interest under Exemption 7(C).[51] For the same reasons discussed above, the D.C. Circuit's use of an incorrect standard does not justify granting the OIC's petition.

Moreover, the OIC has jumbled cases together that do not use this erroneous standard with those cases that do.[52] Cases holding that a "general interest" in finding the truth is insufficient,[53] or that impugning government reports without "a scintilla of evidence" is insufficient,[54] are not the same as cases requiring "compelling evidence" of "illegal activity."

The Ninth Circuit's decision was not based on a general interest in finding the truth or impugning government reports without a scintilla of evidence. Rather, the Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[55] Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents. Contrary to the OIC's implication, this is not a case where "bald allegations of governmental misconduct"[56] were made. The OIC also states that "'speculation' alone cannot be enough under Exemption 7(C) . . . to outweigh the profound privacy interests of third

[50] OIC Pet. 9.
[51] *Id.*
[52] OIC Pet. 9-10.
[53] *See e.g., Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).
[54] *See e.g., Department of State v. Ray*, 502 U.S. 164, 179 (1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).
[55] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[56] OIC Pet. 10.

parties in avoiding disclosure."[57] That would be a good point to make in a FOIA case that involved "speculation alone," but that is not this case.

B. The OIC's False Argument That The Photographs At Issue Reveal Nothing About The Government's Conduct Does Not Justify Granting The OIC's Petition.

The second aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is that "[t]he photographs at issue here reveal nothing about the government's conduct; they reveal only visual depictions relating to the death of Vincent Foster."[58] The OIC's statement is false. The government conduct at issue is the quality of its investigation into the cause of Foster's death and the accuracy of its conclusion about that death. Photographs of Foster's body will either be consistent or inconsistent with the government's conclusion of suicide in the park. Therefore, the photographs will reveal something about the government's conduct. It is completely illogical for the OIC to state that photographs of a body that has been mysteriously shot reveal nothing about the quality of the investigation into that death. Does the OIC also believe that the photographs were completely irrelevant to the death investigation?

It is especially important in this case that the public see the raw evidence because the government's reports about the death are untrustworthy and deceptive, when compared with the publicly available raw evidence. Because the public cannot trust the government to fairly and accurately characterize the evidence in this case, the public, by definition, must see the evidence for itself.

Moreover, the factual issue of what the photographs reveal is not a sufficient basis for the OIC's petition, as stated in Supreme Court Rule 10. Additionally, the OIC

[57] OIC Pet. 18.
[58] OIC Pet. 14.

makes the same mistake as the intervenors in relying on Judge Pregerson's dissenting opinion and characterization of the evidence,[59] not the evidence.

The OIC supports its argument with a statement that has no relevance to this case. The states: "FOIA, however, does not give the public a generalized 'right to know' personal details about private third parties that happen to be maintained in government files."[60] However, there are no "personal details" or any details about Foster's survivors in these photographs. The only person depicted in the photographs is Foster and because he is deceased, his privacy is not an issue in this case.

The OIC takes an unduly crabbed view of the public's interest in seeing the four photographs ordered released. The OIC made it sound as if the only reason to see the photos is to examine Foster's "head injuries" or "the bullet's path"[61] and the OIC argues that the four photos ordered released have no value to the public.[62] This is false, for the reasons stated above.

C. The OIC's Mischaracterization Of The Ninth Circuit's Opinion Does Not Justify Granting The OIC's Petition.

The third aspect of the Ninth Circuit's evaluation of the public interest side of the balance under Exemption 7(C) raised by the OIC is based on the OIC's mischaracterization of the Ninth Circuit's opinion. The OIC correctly quotes the Ninth Circuit as stating that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations."[63] The Ninth Circuit's statement is

[59] OIC Pet. 11-14.
[60] OIC Pet. 13.
[61] OIC Pet. 14.
[62] OIC Pet. 11-14.
[63] OIC Pet. 15 (quoting *Favish*, 217 F.3d at1173).

completely true and the OIC presents no authority to contradict that statement.

Instead, the OIC mischaracterizes the Ninth Circuit's statement and then attacks the mischaracterization as if it was the Ninth Circuit's holding. The OIC mischaracterizes the Ninth Circuit's statement into the following:

> The court of appeals also erred in holding that the multiple, lengthy investigations that had already taken place and the enormous volume of materials (including photographs about Foster's death already in the public domain were completely irrelevant to evaluation of the public interest in disclosure of the particular photographs at issue here. . . . By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which would contribute only marginally, if at all, to public understanding.[64]

Contrary to the OIC's mischaracterization, the Ninth Circuit did not state that the government's reports and publicly available evidence about the death were "completely irrelevant to evaluation of the public interest" in this case. Nor did the Ninth Circuit give "no weight" to those reports and evidence. Rather, after being presented with the deceptions and omissions in the government reports, when compared to the government's own raw publicly available evidence, the Ninth Circuit stated that "Favish, in fact, tenders evidence and argument which, if believed, would

[64] OIC Pet. 15.

justify his doubts" about the government's conclusion of suicide in the park.[65]

Rather than holding the government reports and publicly available evidence irrelevant, the Ninth Circuit found that the reports and evidence were deficient enough to justify its statement that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park.[66] The OIC fails to disprove the Ninth Circuit's statement.

Moreover, the OIC's argument is based on the following statement:

> In this case, when five investigations in different branches of the federal government (including by the Office of Independent Counsel) have uniformly reached the same result, the contribution to public understanding that a *sixth* investigation by an unsatisfied private citizen can make is marginal at best.[67]

The OIC makes this statement as if the credibility of the government investigations is irrelevant. Under the OIC's view, it is difficult to see why there is any need for the FOIA at all because if the government has conducted several investigations, no matter how untrustworthy, the public has no need to see any of the hidden evidence.

The OIC's view is contrary to the purpose of the FOIA. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the government

[65] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[66] *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000).

[67] OIC Pet. 17.

honest in order to preserve our constitutional democracy.[68] This Court also has held:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[69]

Consistent with these holdings, the District of Columbia Circuit has discussed the nature of the public interest that could be served by disclosure of government investigative records:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.[70]

The number of government investigations is not as important as the demonstrable credibility, or lack of credibility, of those investigations. As established below, the government investigations are either not credible or were so limited as to be inappropriate to cite as support for the government's official conclusion.

3. The Fiske And Starr Reports On The Death Are Untrustworthy.

Permeating the OIC's and the intervenors' petitions is the assumption that the majority of the Ninth Circuit panel had no basis for holding that "Favish, in fact, tenders evidence and argument which, if believed, would justify his

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[68] *Department of Justice v. Reporters Committee*, 489 U.S. 749, 772-775, 103 L.Ed.2d 774 (1989).
[69] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L.Ed.2d 159, 178 (1978).
[70] *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984).

doubts" about the government's conclusion of suicide in the park.[71] That assumption is false. The Ninth Circuit majority had good reason to make its statement.

The OIC states that "Favish asserts that he needs the photographs to investigate his allegations of a government-wide conspiracy to cover-up the 'murder' of Foster."[72] The OIC's statement is false. Favish relies upon undisputed facts from the government's own underlying investigative record that do not prove to a certainty either murder or suicide in the park. However, when compared with the reports on the Foster case from Independent Counsels Robert Fiske and Kenneth Starr, those facts establish beyond question that both of those reports are not worthy of the public's trust.

The intervenors state that Favish is a "conspiracy theorist . . . ."[73] No matter how much the intervenors and the OIC argue that it is impossible for such a significant number of government officials and consultants to have produced such deceptive reports, the fact remains that they did, and that is the fundamental truth from which our analysis must begin.[74] The OIC stated: "Having examined, and rejected, all of Favish's specific factual assertions, at best Mr. Favish's assertion of 'public interest' in this case is based upon conspiracy theories and speculation of a mass governmental cover-up relating to Mr. Foster's suicide."[75] Although the OIC may have "rejected" all of Favish's specific factual assertions, it has not refuted them. Contrary to the OIC's statement, Favish's assertion of the public interest is not based exclusively on "conspiracy theories." Such

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[71] *Favish v. OIC*, 217 F.3d 1168, 1173 (9th Cir. 2000).
[72] OIC Pet. 12.
[73] Intervenors' Pet. 2.
[74] It should be noted that it is not necessary for everybody involved in the Foster investigations to have deliberately deceived the public. In addition to those who act deliberately, shoddy work is done by people who are disinterested, lazy, or who are acting reasonably but who have been given incorrect or incomplete information from which to work.
[75] ER 474, 497.

conspiracies remain a possibility, especially because the OIC has failed to explain how the significant distortions and omissions in the Fiske and Starr reports were made.

The OIC states that privacy interests "cannot be trumped by such speculation of government wrongdoing or misconduct."[76] The word "speculation" implies that Favish has not shown any proof that the Fiske and Starr reports are untrustworthy and that there was government misconduct, either intentional or negligent. Contrary to the OIC's statement, the proof of at least negligent misconduct is overwhelming. As to whether any of the misconduct was intentional, there is plenty of circumstantial evidence to take that conclusion beyond the point of mere "speculation."

Moreover, the integrity of the federal court system is at stake because in addition to the public, the OIC misled the special three-judge panel that oversaw its Foster work and to whom Starr's OIC initially delivered its Foster report in 1997.

The Congressional "investigations" involving this death were so limited that they did not investigate the issue of whether Foster was murdered or committed suicide at the park.[77]

Starr failed to tell the public and the three-judge panel that the Park Police and a medical doctor at the death scene reported that they saw no blood spatter on the vegetation in the area that would have been behind Foster's head when he allegedly shot himself.[78]

Starr failed to tell the public and the three-judge panel that the first person officially to see Foster's deceased body and who testified that he did not see any gun in Foster's hand, also testified that the "gun in hand" photo did not depict what he saw.[79]

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[76] ER 474, 497.
[77] ER 602-609, 277, 288.
[78] ER 105, 109, 150, 153.
[79] ER 168-170, 178-179, 277, 358.

Starr and Fiske used an invalid gun identification.[80]

Fiske and Starr failed to tell the public and the three-judge panel that the Park Police Chief made a false statement about alleged identification of the gun.[81]

Fiske and Starr failed to tell the public and the three-judge panel that the medical report by the only doctor to examine Foster at the park reported a neck wound that officially did not exist and certified copies of his report are not the same and appear to have been improperly altered.[82]

Starr falsely implied that the Park Police observed the entire autopsy and Fiske and Starr failed to tell the public and the three-judge panel that before the Park Police arrived, Foster's tongue and soft palate were removed by the autopsy doctor who violated policy by beginning the autopsy before arrival of the police.[83]

Starr failed to tell the public and the three-judge panel that three of the four witnesses who allegedly saw Foster's car in the parking lot during a certain time period after he was dead, reported a car that was a different color than Foster's. Although he accurately reported that the fourth of these witnesses reported seeing a car of a different color than Foster's, Starr concluded that Foster's car was in the parking lot without explaining why all four of these witnesses were mistaken and reported the same color car—one that was a different color than Foster's car.[84]

Starr relied on Dr. Henry Lee's conclusion that Foster's clothes revealed no evidence that Foster's body had been dragged, without telling the public and the three-judge panel that this conclusion was worthless because the Park Police

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[80] ER 89, 92, 147-149, 156, 178-179, 277, 355, 362-363, 474, 488.
[81] ER 151, 152, 155, 156, 158, 474, 492.
[82] ER 44-47, 241-245, 277, 308-09, 311-312, 314-15, 600, 632-635, 643-650.
[83] ER 115, 117-18, 134-35, 154, 277, 309, 345.
[84] ER 57, 89-90, 105, 107-08, 124-26, 128, 130, 137-43, 154, 168, 172, 277, 299, 302, 307, 349, 350, 474, 496.

stated that they dragged Foster's body when it began to slide down the hill during an examination.[85]

Fiske and Starr failed to tell the public and the three-judge panel about an FBI memo to the Director of the FBI, written two days after the death, stating that the shot was fired into Foster's mouth without leaving an exit wound, thereby directly contradicting Starr, Fiske and the official autopsy report.[86]

Starr implied that the reason for the lack of readable x-rays of Foster is that the x-ray machine was not functioning properly. However, Starr failed to tell the public and the three-judge panel that the records show that the first service call for the x-ray machine was made more than *three months after* Foster's death.[87]

CONCLUSION

The intervenors' and the OIC's petitions should be denied.

Respectfully submitted.

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[85] ER 105, 109, 111, 146, 277, 332, 377, 474, 489.
[86] ER 277, 311-312, 314, 636-641.
[87] ER 356-57. These records were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM's attorney, were attached to Favish's opening brief to the Ninth Circuit in appeal no. 2 as an Addendum.

Supreme
APR 4

No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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5 U.S.C. 552 1
5 U.S.C. 552(b)(7)(C) 1, 2, 5, 7, 8

In the Supreme Court of the United States

No. 02-954

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In this case, the Ninth Circuit has ordered the release, under the Freedom of Information Act (FOIA), 5 U.S.C. 552, of the very same photographs that the D.C. Circuit previously had held were exempt from disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C). That direct conflict in the circuits on the disposition of two FOIA requests for the same documents reflects a deeper divergence in the courts of appeals over the proper analysis of the public interest side of Exemption 7(C)'s balancing test. The Ninth Circuit came to a different result because it analyzed the applicability of Exemption 7(C) under different legal standards than those applied by the D.C. Circuit and other circuits.

The importance of that question is reflected in the Court's decision, earlier this Term, to grant certiorari in *United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives* v. *City of Chicago*, No. 02-322 (*ATF*), to address the courts of appeals' divergent approaches to the public interest prong of the Exemption 7(C) analysis. See 02-322 Pet. at i, 17-19. Indeed, it was because the question of the proper application of Exemption 7(C) was already pending before the Court that the government suggested that the present petition be held pending the Court's decision in *ATF*. See 02-954 Pet. 7-9, 18-19. However, on February 26, 2003, the Court summarily vacated the court of appeals' decision in *ATF* and remanded for reconsideration in light of an intervening Act of Congress, Division J, Title 6, Section 644, of the Consolidated Appropriations Resolution, 2003, H.R. J. Res. 2, 108th Cong., 1st Sess. (2003). The Court accordingly did not address the merits of the Exemption 7(C) claim in the *ATF* case. The intervening legislation had particular application to the Freedom of Information Act request at issue in the *ATF* case. It has no application to the instant petition, and it did not address the courts of appeals' differing approaches to Exemption 7(C) claims. Accordingly, the government now submits that the certiorari petition in this case should be granted to address that enduring circuit conflict.

1. Exemption 7(C) protects from disclosure law enforcement records, such as the death-scene photographs at issue here, if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In applying Exemption 7(C), courts must balance the public interest in the documents against the intrusion on privacy that disclosure would occasion. See *Department of Justice*

v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

In this case, the only public interest asserted by respondent Favish is in uncovering alleged governmental misfeasance in the conduct of five different investigations into Foster's death. As explained in the government's petition (see 02-954 Pet. 9-11), in concluding that the public interest in disclosure of the four photographs of Vincent Foster's body outweighed the familial privacy interest, the Ninth Circuit held that actual evidence or knowledge of "misfeasance by the agency" is not necessary. Pet. App. 11a. All the Ninth Circuit required to outweigh a valid privacy interest was an "argument" and some indiscernible quantum of "evidence" that, "if believed," would reveal governmental misconduct. *Ibid.* That holding directly conflicts with the decision of the D.C. Circuit concerning the same (and other) photographs. *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000). In that case, the D.C. Circuit applied established circuit precedent requiring compelling evidence of governmental misconduct to overcome the presumption of legitimacy that attaches to governmental actions and to outweigh legitimate privacy interests. *Id.* at 124; see also *Davis* v. *United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992); *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991); *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.). Other courts of appeals have likewise required more substantial showings. See *Neely* v. *FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest is "negligible" in absence of a "compelling allegation of agency corruption or illegal-

ity"); *KTVY-TV* v. *United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).

Respondent Favish acknowledges (Br. in Opp. 2-3) the conflict in legal standards applied by the courts of appeals, and does not disagree that they resulted in essentially the same FOIA case being decided differently by the Ninth and D.C. Circuits. Favish's only answer is to suggest that the courts' approaches admit of even greater variety. *Id.* at 15. But that argument enhances, rather than diminishes, the need for this Court's intervention.

The government's petition further notes the tension between the Ninth Circuit's analysis and this Court's decision in *Department of State* v. *Ray*, 502 U.S. 164 (1991). In *Ray*, the Court explained that an "asserted interest in ascertaining the veracity of the [government's] interview reports" would not outweigh privacy interests, where "[t]here is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports." *Id.* at 179. The Court left open in that case the question of "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure," *ibid.*, which is the very question on which the courts of appeals are now in conflict.

As Favish emphasizes repeatedly (Br. in Opp. 15, 18, 20), under the Ninth Circuit's approach, the privacy interests of third parties in law-enforcement records would be overcome if a FOIA requester "tenders" speculation and "argument" that, "if believed," would reveal governmental misfeasance. Under that standard, all it would take to obtain private information from government files is one individual who refuses, in the face of five different investigations by different branches of the government and two Independent

Counsels, to "trust the government to fairly and accurately characterize the evidence" (*id.* at 16), unless he "see[s] the evidence for [him]self." Because such allegations of governmental misconduct are "easy to allege and hard to disprove" to the level of satisfaction required by the Ninth Circuit here, *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998), that standard empties Exemption 7(C) of important privacy protection for third parties, contrary to this Court's direction in *Ray*, 502 U.S. at 179.

2. As the government's petition also explains (at 11-14), under the *Reporters Committee* balancing test, the relevant public interest under Exemption 7(C) is the extent to which disclosure would "contribute *significantly* to public understanding of the operations or activities of the government." 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994); see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). Following this Court's direction, other courts of appeals have required FOIA requesters to demonstrate a nexus between the disclosure of the specific document and advancement of the identified public interest. See 02-954 Pet. 11-12 (citing cases).

The Ninth Circuit, however, required no such nexus here. See 02-954 Pet. 11-14. As explained in the petition, Favish claims that one of the photographs would assist in investigating the gun used by Foster to commit suicide. Numerous pictures of Foster's gun, however, have already been released to Favish. *Id.* at 12-13. The court of appeals offered no explanation as to how the release of yet another picture of the gun would "contribute significantly" to public understanding of the government's activities. Any public interest in analyz-

ing blood and other matter on the gun (Br. in Opp. 7) was fully served by disclosure of the earlier photographs of that same gun. Beyond that, Favish's personal interest in seeing every picture of the gun in the possession of the government because the government is "demonstrably untrustworthy and deceptive" (*id.* at 6)—an assertion rejected by five other investigations into the death of Foster—cannot be equated with the "public" interest. *Stone* v. *FBI*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) ("[T]he same bit of new information considered significant by zealous students of the [] investigation would be nothing more than minutiae of little or no value in terms of the public interest."), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990) (sustaining the withholding of information concerning the assassination of Robert F. Kennedy).

Favish also argues (Br. in Opp. 7) that he wants to investigate "why the gun appears to be partially lodged under Foster's leg." That argument—which amounts to nothing more than speculation about the implications of the gun's location—highlights the unworkability of the Ninth Circuit's approach. Some FOIA requesters have an unlimited capacity to see new indicia of governmental conspiracy or cover-up at every turn, and simply asking whether their speculation and suspicions, "if believed," would reveal governmental misconduct—which, by definition, they would— leaves no substantial protection for the privacy interests of third parties in information that "happens to be in the warehouse of the Government," *Reporters Comm.*, 489 U.S. at 774.

With respect to the other photographs at issue, Favish's extended discussion (Br. in Opp. 8-13) of his desire to track the flow of blood from Foster's head and to look for signs of a neck wound proves the point made

in the government's certiorari petition. None of the photographs ordered released reveal Foster's head or neck; they all focus on his shoulder, arm, and torso. Having concluded that the pictures relevant to that inquiry—photographs of Foster's head and face—should *not* be disclosed, the court of appeals was not free to order the disclosure of other photographs to compensate for that withholding.

3. The Ninth Circuit again departed from this Court's and other circuits' precedent when it held that the multiple, lengthy investigations that had already taken place into Foster's death, and the enormous volume of materials (including photographs) about that death already in the public domain are irrelevant to evaluation of the public interest under Exemption 7(C). Compare Pet. App. 11a ("Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations."), with *Ray*, 502 U.S. at 178 (the "public interest has been adequately served by disclosure of the redacted interview summaries"); *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) ("That [public] interest, however, has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned."); *Marzen* v. *HHS*, 825 F.2d 1148, 1153-1154 (7th Cir. 1987) (release of information "would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report are already in the public domain"); and 02-954 Pet. 16 n.7 (citing additional cases).

Favish insists (Br. in Opp. 18-19) that the court of appeals properly disregarded the volume of information already released to the public because Favish articulated arguments that, "if believed," would suggest deficiencies in the government's investigation. As before, that argument mistakenly equates Favish's personal interest in disclosure of every single record and document related to the Foster investigation, no matter how private, with the public's interest in knowing "what the Government is up to," *Reporters Comm.*, 489 U.S. at 780. Other courts of appeals have rejected that proposition. *See Cooper Cameron Corp.* v. *United States Dep't of Labor*, 280 F.3d 539, 549 (5th Cir. 2002) (describing Favish's asserted public interest as "highly tenuous" in light of the previous investigations); 02-954 Pet. 16-17 & n.7.

4. In any event, the relevant question for present purposes is not whether the Ninth Circuit's reading of Exemption 7(C) is correct, but whether other courts of appeals would have applied different legal standards to Favish's FOIA claim and come out differently. That question is answered by the D.C. Circuit's decision sustaining the withholding of the same photographs that the Ninth Circuit has ordered released. Accordingly, authoritative guidance from this Court is necessary to establish uniformity in the analysis of the public interest prong of the Exemption 7(C) balance. The privacy interests of millions of individuals, about whom personal and sensitive information is stored in government files, should not vary based on the circuit in which a FOIA request is filed.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THEODORE B. OLSON
Solicitor General

APRIL 2003

(5)
Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: DEC. 20, 2002
CERTIORARI GRANTED: MAY 5, 2003

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

CIVIL DOCKET FOR CASE #: 97-CV-1479

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY,
INTERVENORS

v.

OIC, DEFENDANT

Filed: Mar. 6, 1997

DOCKET PROCEEDINGS

DATE	DOCKET NUMBER	DOCKET ENTRY
3/6/97	1	COMPLAINT (Summons(es) issued) (referred to Discovery Charles F. Eick) (bg) [Entry date 03/10/97]
		* * * * *
4/28/97	5	ANSWER by defendant OIC to [1-1](lc) [Entry date 04/30/97]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
9/8/97	14	NTC OF FILING AND DECLARATION of Kevin A Martin for in camera exam by defendant OIC * * * FILED UNDER SEAL * * * (lc) [Entry date 09/10/97]
	* * * * *	
1/5/98	21	NOTICE of filing and filing of decl of Darrell M. Joseph and Exhs I and III by defendant OIC (pbap) [Entry date 01/07/98]
1/5/98	22	NOTICE of filing and filing of exh II to the decl of Darrell M. Joseph by defendant OIC (pbap) [Entry date 01/07/98]
1/23/98	23	NOTICE of filing suppl decl of Darrell M Joseph by defendant OIC (lc) [Entry date 01/27/98]
2/11/98	24	STIPULATION and ORDER by Judge William D. Keller that all of pltf's claims in this actn as to all information withheld purs to 5 U.S.C. 552(b)(3) which information is located in photographs identified in this actn if Category 5 as Docs 2389A,

DATE	DOCKET NUMBER	DOCKET ENTRY
		2389B, 2389C, 2391A, 2391B, in Category 7 as Docs 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Docs in Category 10, which were identified as Docs 2425A, 2425B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B), and the pltf's claims as to information withheld purs to 5 U.S.C. 552(b)(7)(C) (which information is located in photographs identified in this actn in Category 8 as Docs 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Docs 2415C, 2415D, 2422A, 2422B) are hereby dismissed with prej. (ENT 2/12/98) mld cpys (pbap) [Entry date 02/12/98]
2/11/98	25	NOTICE OF MOTION AND MOTION by plaintiff Allan J Favish for summary adjudication; motion hearing set for 3:00 3/98/98 (lc) [Entry date 02/12/98]

DATE	DOCKET NUMBER	DOCKET ENTRY
2/11/98	—	LODGED stmt of undisputed facts submitted by plaintiff (FWD TO CRD)(lc) [Entry date 02/12/98]
2/13/98	26	NOTICE OF MOTION AND MOTION by defendant OIC for summary judgment; motion hearing set for 3:00 3/9/98 (pbap) [Entry date 02/18/98]
		* * * * *
3/5/98	34	NOTICE of filing org 34d decl of Darrell M Joseph by defendant OIC (lc) [Entry date 03/09/98]
3/6/98	36	NOTICE of filing orig decl of Shelia Foster Anthony by defendant OIC (lc) [Entry date 03/10/98]
3/9/98	37	MINUTES: Bf crt are ptys cross mot fr s/j: Crt ORD granting OIC motion for summary judgment [26-1], terminating case by Judge William D. Keller CR: none (ENT 3/11/98) mld cpys and ntcs pyts MDJS-6(lc) [Entry date 03/11/98]

DATE	DOCKET NUMBER	DOCKET ENTRY
3/13/98	38	NOTICE OF APPEAL by plaintiff Allan J Favish to 9th C/A from Dist. Court ord ent 3/11/97 [37-2] (cc: Allan J. Favish; AUSA Luymes) Fee: Paid (app) [Entry date 03/16/98]
		* * * * *
4/1/98	42	TRANSCRIPT filed for proceedings held on 3/9/98 (pjap) [Entry date 04/07/98]
4/13/98	43	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [38-1] 98-55594 (pjap) [Entry date 04/13/98]
4/14/98	44	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (ghap) [Entry date 04/14/98]
		* * * * *
9/8/00	—	LODGED CC 9thcca Jgmt of Dist Court hereby is Reversed & Remanded. (98-55594) (FWD TO CRD) (weap) [Entry date 09/19/00]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
10/13/00	88	CERTIFIED COPY of Appellate Court Order: #98-55594. IT is now here ordered and adjudged by this crt, that the judgment of the said dist crt in this cause be and hereby is REVERSED AND REMANDED. [38-1] (no reopen per crd) SEND (yc) [Entry date 06/04/01]
10/13/00	89	MANDATE from Circuit Court of Appeals #98-55594, the crt orders the office of independent cnsl to deliver the original ten post-mortem Polaroid Photographs at issue to this crt for in camera review. After review the crt w/rule whether the photos fall w/in the privacy exemption. Mandate is filed and spread on record. (SEND) (yc) [Entry date 06/04/01]
		* * * * *
10/17/00	—	TRANSCRIPT filed for proceedings held on 10/13/00 (pjap) [Entry date 10/18/00]
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
1/9/01	57	Ntc of filing & filing of REPORT of independent cnsl on the death of Vincent Foster filed by defendant OIC (tw) [Entry date 01/11/01]
1/9/01	58	NOTICE of submission under seal of ten original Polariod Pictures to crt for crt's in camera, ex parte examination by defendant OIC (tw) [Entry date 01/11/01]
1/9/01	59	NOTICE of filing & filing of decl of Regina A. McCoy & exh A attached thereto by defendant OIC (tw) [Entry date 01/11/01]
1/9/02	60	NOTICE of filing & filing of appendix to rpt by defendant OIC on death of Vincent Foster (tw) [Enty date 01/11/01]
1/10/01	56	MINUTES: IN CHAMBERS REVIEW OF DOCUMENTS & COURT HEARING: FBI agents are present w/ sealed docs to be reviewed in chambers by the Crt. Immediately following the Crt's review of the docs, the Crt holds a hrg re the stat of its

DATE	DOCKET NUMBER	DOCKET ENTRY
		review. Crt & defense cnsl discuss the crt's intended ord on S/J which the crt will issue by a separate minute ord. Docs are rtn to the FBI agents. by Judge William D. Keller CR: Linda Morris (mch) [Entry date 01/11/01]
1/11/01	61	MINUTES: In this case, the appellate crt appears to have defined the zone of privacy protection as those photographs that are graphic explicit & extremely upsetting. See the decision at pg 1174. As regards the balance of the photographs referenced at pg 46 of exh to the ntc, the crt rules as follows: (see min ord). Accordingly sum jgm is ent in fav of the OIC wi resp to photograph #4 fr the top section of exh list & photographs #3, #6, #7 & #8 identified in the bottom section of the exh list. Absent an appeal, the photographs must be provided to plfs cnsl w/i 60 dys of this ord. In the event neither pty

DATE	DOCKET NUMBER	DOCKET ENTRY
		chooses to appeal, the photographs wil be provided w/i 10 dys of such determination. In the event of an appeal the photographs sbj to the appeal will remain under seal until such time as there is a final decision by the crt of appeals. by Judge William D. Keller CR: n/a (ENT 1/12/01), mld ntcs. (tw) [Entry date 01/12/01]
		* * * * *
1/29/01	64	NOTICE OF MOTION AND MOTION by Sheila Foster Anthony & Lisa Foster Moody to intervene; motion hearing set for 3:00 3/5/0 (tw) [Entry date 01/30/01]
		* * * * *
1/29/01	66	NOTICE OF MOTION AND MOTION by defendant OIC to alter or amend judgment and for clarification; motion hearing set for 10:00 3/5/01 (yc) [Entry date 01/31/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
		* * * * *
2/13/01	68	NOTICE of filing of amd decls of Sheila Foster Anthony & Lisa Foster Moody to comply wi local rule 31.6(tw)] [Entry date 02/14/01]
		* * * * *
3/5/01	75	MINUTES: granting Dfts in Intervention Shelia Foster Anthony & Lisa Foster Moody's motion to intervene [64-1]; denying plf Alan J Favish motion to compel testimony re allegations of illegal government conduct re sbj photographs [62-1], denying dfts intervention's motion to alter or amend judgment and for clarification [66-1]. Mot to appear pro hac GRANTED by Judge William D. Keller CR: Linda Morris (pj) [Entry date 03/08/01]

DATE	DOCKET NUMBER	DOCKET ENTRY
3/9/01	76	NOTICE OF APPEAL by plaintiff Allan J Favish to 9th C/A from Dist. Court min ord ent 1/12/01 [61-1] (cc: Allan J. Favish; Jan L. Luymes; Latham & Watkins; Swidler, Berlin, Shereff & Friedman) Fee: Paid. (ghap) Entry date 03/09/01]
		* * * * *
3/27/01	79	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [76-1] 01-55487 (pjap) [Entry date 03/27/01]
		* * * * *
4/23/01	—	TRANSCRIPT filed for proceedings held on 3/5/01. (ghap) [Entry date 04/24/01]
4/26/01	82	NOTICE OF APPEAL by Defendant in-Intervention Sheila Foster Anthony, Defendant in-Intervention Lisa Foster Moody to 9th C/A from Dist. Court minutes fld 1/11/01 & ent 1/12/01 [61-1] and minutes fld

DATE	DOCKET NUMBER	DOCKET ENTRY
		3/5/01 [75-1] (cc: Lathan Watkins, Swidler Berlin Shereff Friedman, Allan J. Favish, Jan L. Luymes) Fee: Billed (dl) [Entry date 04/27/01]
4/26/01	83	NOTICE OF APPEAL by defendant Office of Independent Counsel ("OIC") to 9th C/A from Dis. Court minutes fld 1/11/01 & ent 1/12/02 [61-1] and minutes fld 3/5/01 [75-1] (cc: Jan L. Luymes, AUSA, Allan J. Favish, Esq., Swidler, Berlin, Shereff & Friedman) Fee: Gov Waived (dl) [Entry date 04/30/01]
		* * * * *
5/16/01	85	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [83-1] 01-55789 (ghap) [Entry date 05/16/01]
5/16/01	86	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [82-1] 01-55788. (ghap) [Entry date 05/16/01]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-55594

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT-APPELLEE

Filed: Apr. 6, 1998

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/6/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 3/23/98; appellee's designation of RT is due 4/2/98; appellant shall order transcript by 4/13/98; court reporter shall file transcript in DC by 5/13/98; certificate of record shall be filed by 5/20/98; appellant's opening brief is due 6/29/98; appellees' brief is due 7/29/98; appellants' reply brief is due 8/12/98; [98-55594] (mss) [98-55594]

DATE	PROCEEDINGS
4/6/98	Filed attorney for Appellant Civil Appeals Docketing Statement served on 3/13/98 (to CONFATT) [98-55594] [98-55594] (mss) [98-55594]
	* * * * *
4/13/98	Filed original and 15 copies Appellant Allan J. Favish opening brief (Informal: n) 51 pages and five excerpts of record in 3 volumes; served on 4/9/98 [98-55594] (sa) [98-55594]
	* * * * *
8/20/98	Filed original and 15 copies appellee OIC 42 page brief, five sets Supp. Exc. in one volume; served on 8/12/98 [98-55594] (sa) [98-55594]
	* * * * *
8/31/98	Filed original and 15 copies Allan J. Favish reply brief, (Informal: n) 25 pages; served on 8/23/98 [98-55594] (sa) [98-55594]

DATE	PROCEEDINGS
	* * * * *
9/15/98	FILED CERTIFIED RECORD ON APPEAL; IN 0 CLERKS REC, 1 RTs. (Orig) [98-55594] (jay) [98-55594]
	* * * * *
11/1/99	ARGUED AND SUBMITTED TO Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN [98-55594] (rmw) [98-55594]
	* * * * *
7/12/00	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Harry PREGERSON, partial concurrence and partial dissent; John T. NOONAN, author; Diarmuid F. O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [98-55594] (crw) [98-55594]
	* * * * *
9/6/00	MANDATE ISSUED [98-55594] (crw) [98-55594]
	* * * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55487

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS-APPELLANTS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

Filed: Mar. 20, 2001

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/20/01	DOCKETED CAUSE AND ENTERED APPEARANCE OF APLT IN PRO PER (REPRESENTING SELF AS COUNSEL OF RECORD) AND COUNSEL FOR APLES. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 3/19/01; appellee's designation of RT is due 3/29/01; appellant shall order transcript by 4/9/01; court reporter shall file transcript in DC by 5/9/01; certificate of record shall be filed by 5/16/01; appellant's opening brief is due 6/25/01; appellees' brief is due 7/25/01; appellants' reply brief is due 8/8/01; [01-55487] (pg) [01-55487]

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3/20/01	Filed Allan J. Favish's Civil Appeals Docketing Statement served on 3/9/01 (to CONFATT) [01-55487] [01-55487] (pg) [01-55487]
	* * * * *
5/30/01	Filed original and 15 copies Appellant Allan J. Favish opening brief (Informal: No) 69 pages and excerpts of record in 3 volumes; served on 5/25/01 [01-55487] (kkw) [01-55487]
5/30/01	Filed Appellant Allan J. Favish in 01-55487's motion to hear case before same panel as in prior appeal served on 5/25/01 [4178643] MOATT [01-55487] (kkw) [01-55487]
6/4/01	Filed order (Deputy Clerk: jes) The court, on its own motion, consolidates appeal nos. 01-55788, and 01-55789. These consolidated appeals are hereby designated as X-appeals from appeal no. 01-55487. All previous briefing schedules are vacated. The following briefing schedule shall govern these X-appeals: Favish's opn brief is due 7/20/01; Office of Independent Counsel's and Anthonys' ans brief are due 8/29/01; Favish's rpy brief is due 9/29/01; the Office of Independent

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	Counsel's and Anthonys' opt rpy briefs are due within 14 days after service of Favish's rpy biref. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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9/17/01	Filed original and 15 copies OIC in 01-55487, OIC in 01-55789 second brief on cross-appeal (Informal: No) of 48 pages; served on 9/12/01 [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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2/25/02	Filed Appellee in 01-55487's response to Chamber's request for photo on 2/20/02 ; served on 2/22/02 PANEL. [01-55487] (kkw) [01-55487]
	* * * * *
6/4/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,) The judges on the panel to which these cases have been assigned have unanimously determined that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, these cases were submitted on the briefs and records on 5/20/02 in San Francisco, Ca. without oral argument. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
6/6/02	FILED MEMORANDUM DISPOSITION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Unsigned, Unpublished. Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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8/16/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN,): . . . The petitions for rehearing are denied and the suggestions for rehearing en banc are denied. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
8/20/02	Filed OIC and USA motion to stay the mandate. Served on 8/19/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
8/21/02	Filed Lisa Foster Moody & Sheila Foster Anthony motion to stay the mandate. served on 8/20/02 PANEL. (kkw) [01-55487 01-55788 01-55789]
9/5/02	Filed order (Harry PREGERSON, John T. NOONAN, Diarmuid F. O'SCANNLAIN): The motions filed by the parties to stay the mandate for 90 days are granted. [01-55487, 01-55788, 01-55789] (kkw) [01-55487 01-55788 01-55789]
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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55788

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS-APPELLANTS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

Filed: May 15, 2001

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS is past due; CADS must be filed no later than 5/22/01 for G. Andrew Lundberg; appellant's designation of RT is due 5/7/01; appellee's designation of RT is due 5/16/01; appellant shall order transcript by 5/29/01, ; court reporter shall file transcript in DC by 6/26/01; certificate of record shall be filed by 7/3/01; appel

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	lant's opening brief is due 8/13/01, ; appellees' brief is due 9/11/01; appellants' reply brief is due 9/25/01; [01-55788] (rmw) [01-55788]
5/23/01	Filed James Hamilton for Appellants Lisa Foster Moody and Sheila Foster Anthony's Civil Appeals Docketing Statement; served on 5/18/01 (to CONFATT) [01-55788] [01-55788] (hh) [01-55788]
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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55789

ALLAN J. FAVISH, PLAINTIFF-APPELLANT

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT-APPELLANT

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, DEFENDANTS-INTERVENORS

Filed: May 15, 2001

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5/23/01	Filed attorney for Appellant in 01-55789 Civil Appeals Docketing Statement served on 5/22/01 (to CONFATT) [01-55789] [01-55789] (em) [01-55789]
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5/9/03	Received notice from Supreme Court, petition for certiorari GRANTED on 5/5/03. Supreme Court No. 02-954 PANEL. (kkw) [01-55487 01-55788 01-55789]

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 97-1479

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

[Filed: Mar.5, 1997]

COMPLAINT FOR INJUNCTIVE RELIEF UNDER FREEDOM OF INFORMATION ACT (5 U.S.C § 552)

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1. This action is brought under the Freedom of Information Act (FOIA), as amended (5 U.S.C. § 552(a)(4)(B)), and seeks a preliminary and final injunction thereunder against the defendant for withholding certain records from plaintiff. This action seeks an order that the records be disclosed.

2. Plaintiff is an individual resident of Los Angeles County, California. Defendant, Office of the Independent Counsel, is a federal administrative agency within the meaning of the Act.

3. Venue of this action is properly laid in this court.

4. Defendant, Office of the Independent Counsel, maintains certain records consisting of photographs

taken in connection with the investigation into the death of Vincent Foster, as follows:

(A) The photographs of a gun that were published on pages 2406-2412 & 2436 of volume 2 Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(B) The photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it that was broadcast by ABC-TV News in March of 1994 and reprinted in Time magazine (March 18, 1996, p. 68). For tentative identification purposes only, this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112 of S. Hrg. Volume 2 (see category (C), below).

(C) The photographs listed on page 2112 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(D) The photographs of a gun and accompanying materials that were published on pages 2395-2399 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(E) The Photographs published on pages 2388-2391 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(F) The photographs published on page 2392 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(G) The photographs published on pages 2393-2394 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(H) The photographs published on pages 2399-2405 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(I) The photographs published on pages 2413-2424 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

(J) The photographs published on pages 2425-2428 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

5. By letter dated January 6, 1997, plaintiff requested that defendant, through the appropriate officer or employee thereof, disclose the records described above to plaintiff and that it permit inspection and copying of the records. See exhibit 1, attached hereto. Such request was refused in writing by defendant on January 24, 1997, citing 5 U.S.C. §§ 552(b)(7)(A) & (C). See exhibit 2, attached hereto.

6. By letter dated January 28, 1997, plaintiff appealed defendant's denial of plaintiff's request. See exhibit 3, attached hereto.

7. By letter dated February 19, 1997, defendant denied plaintiff's appeal. See exhibit 4, attached hereto.

8. The records sought are not covered by the FOIA exemptions and defendant has waived all FOIA exemptions by voluntarily disclosing most of the requested records to third parties.

9. Plaintiff has employed attorneys to represent him in this action, and has incurred and will continue to incur expenses for attorney's fees and costs herein.

10. The subject records were and are identifiable records within the meaning of the Freedom of Information Act. Defendant's refusal to disclose the records to plaintiff was wrongful and without lawful reason or excuse, and plaintiff is entitled to the relief provided by the Act.

Wherefore, plaintiff prays:

1. For preliminary and final injunctions prohibiting defendant from withholding from plaintiff the subject records;

2. For preliminary and final injunctions directing defendant to make such records available to plaintiff and permit the inspection and copying thereof;

3. For attorney's fees and costs, and for such other and further relief as to the court may deem proper.

Dated: March 5, 1997

Respectfully submitted,
ROBERT L. REEVES, a PLC
Attorneys for Plaintiffs

By: ROBERT L. REEVES
ROBERT L. REEVES
Attorney at Law

Allan J. Favish
Attorney at Law
18645 Hatteras St., #289
Tarzana, CA 91356-1802

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Direct Internet: *AJFavish@worldnet.att.net*

January 6, 1997

FOIA Officer
Office of Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Freedom of Information Act Request

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. Sec. 552.

I request copies of the following documents: Photographs taken in connection with the investigation into the death of Vincent Foster. The specific photographs I request are the following:

1. The photographs of a gun that were published on pages 2406-2412 & 2436 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

2. The photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it that was broadcast by ABC-TV News in March of 1994 and reprinted in

Time magazine (March 18, 1996, p. 68). For tentative identification purposes only, this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112 of S. Hrgs. volume 2 (see category 3, below).

3. The photographs listed on page 2112 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

4. The photographs of a gun and accompanying materials that were published on pages 2395-2399 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

5. The photographs published on pages 2388-2391 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

6. The photographs published on page 2392 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

7. The photographs published on pages 2393-2394 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

8. The photographs published on pages 2399-2405 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

9. The photographs published on pages 2413-2424 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

10. The photographs published on pages 2425-2428 of volume 2 of Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation–Washington, DC Phase, S. Hrg. 103-889.

My preference is to obtain the highest quality duplicate photographic prints and negatives of the requested photographs. I assume this would include negatives to be made from the first generation copies of any Polaroid prints and duplicate negatives made from original 35 mm, etc., negatives. If that is not allowable under the law, please state the reason why, in which case I request high quality photocopies. I also request that my copies be in color if the original photograph is in color.

Naturally, any production of photographs by you should be labeled to correspond with one of the appropriate nine categories listed above and labeled to correspond with the photographs as published and listed in the Senate Hearings volumes.

I believe this request should be granted because, to the best of my knowledge, all of the photographs I am requesting have already been published or listed in the Senate Hearings volumes. With regard to those photographs that have already been published, I merely am seeking higher quality images of those photographs.

I would like two sets of the photographs.

I am willing to pay fees for this request up to a maximum of $2000 per set of photographs. If you estimate that the fees will exceed this amount, please inform me first.

If my request is denied in whole or in part, please specify which exemptions are claimed for each document denied. Also, please specify the office and address to which an appeal of any denial should be directed.

Please feel free to telephone or fax if there are any questions of if you need additional information from me.

I expect a response to this request within ten working days, as provided for in the Freedom of Information Act.

Thank you for your consideration of this request.

Sincerely,

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Attorney at Law

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

January 24, 1997

Mr. Allan J. Favish
Attorney at Law
18645 Hatteras Street, #289
Tarzana, CA 91356-1802

Dear Mr. Favish:

We have completed our review of your Freedom of Information Act request dated January 6, 1997, specifying 10 categories of photographs. Based on that review, we have determined that the photos must be withheld pursuant to FOIA Exemption (b)(7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, and (b)(7)(C), which provides protection for law enforcement information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Accordingly, the photographs you have requested are not appropriate for discretionary release. In asserting only Exemptions (b)(7)(A) and (b)(7)(C) with respect to these photos, this Office does not waive its ability to assert other relevant exemptions if need be. *See e.g.*, *Young* v. *CIA*, 972 F.2d 536, 538-539 (4th Cir. 1992); *Gula* v. *Meese*, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988).

If you are dissatisfied with my action on this request, you may appeal from this denial by writing to John Bates, Deputy Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Ave., N.W., Room 490-North, Washington, D.C. 20004, within 30 days of your receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in an appropriate United States District Court. *See* 5 U.S.C. § 552(A)(4)(B).

Sincerely,

/s/ STEPHEN A. KUBIATOWSKI
STEPHEN A. KUBIATOWSKI
Associate Independent Counsel

Allan J. Favish
Attorney at Law
18645 Hatteras St., #289
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January 28, 1997

Mr. John Bates
Deputy Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Room 490-North
Washington, D.C. 20004

By Fax and Mail

Re: Freedom of Information Act Appeal

Dear Mr. Bates:

This is a letter regarding my Freedom of Information Act request dated January 6, 1997.

By letter dated January 24, 1997, your office is withholding the photographs I requested by claiming the exemptions under 5 U.S.C. §§ 552(b)(7)(A) & (b)(7)(C). These exemptions are for documents "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . (C) could

reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ."

I am a reasonable person and do not want to waste your time. However, the failure of your office to provide any explanation justifying your claims leaves me no alternative but to appeal the denial of my request.

I am anxious to learn how release of photographs that already have been published or listed by the U.S. Government "could reasonably be expected to interfere with enforcement proceedings" and "could reasonably be expected to constitute an unwarranted invasion of personal privacy," especially when the photographs, to the best of my knowledge, do not show any persons who are alive.

Sincerely,

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Attorney at Law

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

February 19, 1997

Mr. Allan J. Favish
Attorney at Law
18645 Hatteras Street, #289
Tarzana, CA 91356-1802

Dear Mr. Favish:

I have completed my review of your appeal of this Office's denial of certain aspects of the FOIA request you made in January 6, 1997. Your appeal, specifying 10 categories of photographs, was received by this Office on January 28, 1997.

I have determined that the information to which your appeal related must be withheld pursuant to FOIA Exemption (b)(7)(A), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings, and (b)(7)(C), which provides protection for law enforcement information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Accordingly, the records you have requested are not appropriate for discretionary release and your appeal must be denied. In asserting Exemption (b)(7)(A) and (b)(7)(C) with respect to these records, this Office does

not waive its right or ability to assert other relevant exemptions if the case should arise. *See e.g., Young* v. *CIA*, 972 F.2d 536, 538-39 (4th Cir. 1992); *Guia* v. *Meese*, 699 F. Supp. 956, 959 n.2 (D.D.C. 1988).

Sincerely,

/s/ JOHN D. BATES
JOHN D. BATES
Deputy Independent Counsel

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-97-1479-WDK (Ex)

ALAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

ANSWER TO COMPLAINT FOR INJUNCTIVE
RELIED UNDER FREEDOM OF INFORMATION ACT

COMES NOW defendant Office of the Independent Counsel, by and through its undersigned counsel, and in answer to the individually numbered paragraphs of the plaintiff's Complaint admit, deny and allege as follows:

1. The allegations contained in Paragraphs 1 and 3 consist of plaintiff's characterization of this action or conclusions of law for which no answer is necessary, but insofar as answers may be deemed necessary, Paragraphs 1 and 3 are denied.

2. With regard to the allegations in Paragraph 2, the defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations contained in the first sentence of Paragraph 2. The defendant denies the second sentence of the paragraph, except to admit that defendant is an agency of the United States, established pursuant to the Ethics in Government Act

of 1978, 28 U.S.C. §§ 591-599, as reauthorized by the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

3. With regard to the allegations in Paragraph 4, the defendant is currently without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations as certain photographs and documents cannot be identified from the copies that appear in the report published by the Senate Committee on Banking, Housing, and Urban Affairs, S. Hrg. 103-889. Defendant admits that defendant has in its possession some photographs.

4. With regard to the allegations contained in the first sentence of Paragraph 5, the defendant denies the allegations contained in the first sentence except to admit that defendant received a letter dated January 6, 1997 entitled "Freedom of Information Act Request" from Allan J. Favish, a copy of which is attached to the Complaint as Exhibit 1. Defendant avers that Exhibit 1 is the best evidence of what the plaintiff has requested and Exhibit 1 speaks for itself. With regard to the allegations contained in the second sentence of Paragraph 5, the defendant denies the allegations contained in the second sentence except to admit that a letter was sent from the defendant to Allan J. Favish dated January 24, 1997, a copy of which is attached to the Complaint as Exhibit 2. Defendant avers that Exhibit 2 is the best evidence of what and how the defendant responded to the plaintiff and Exhibit 2 speaks for itself.

5. With regard to the allegations contained in Paragraph 6, the defendant denies the allegations except to admit that defendant received a letter dated January 28, 1997 entitled "Freedom of Information Act Appeal"

from Allan J. Favish, a copy of which is attached to the Complaint as Exhibit 3. Defendant avers that Exhibit 3 is the best evidence of what the plaintiff has requested and Exhibit 3 speaks for itself.

6. With regard to the allegations contained in Paragraph 7, the defendant denies the allegations except to admit that a letter was sent from the defendant to Allan J. Favish dated February 19, 1997, a copy of which is attached to the Complaint as Exhibit 4. Defendant avers that Exhibit 4 is the best evidence of what and how the defendant responded to the plaintiff and Exhibit 4 speaks for itself.

7. The defendant denies the allegations contained in Paragraph 8 and 10.

8. With regard to the allegations in Paragraph 9, the defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations and on that basis denies the allegations contained in Paragraph 9.

9. Any and all allegations of the Complaint not herein before answered are denied.

10. The defendant denies the plaintiff is entitled to the relief sought in any portion of the Complaint or to any part thereof, or to any relief whatsoever.

FIRST AFFIRMATIVE DEFENSE

The plaintiff fails to state a claim upon which relief can be granted.

WHEREFORE, the defendant prays that this action against it be dismissed with prejudice and that judgment be entered in its favor, and award the defendant its costs and such other relief as may be appropriate.

DATED: This 28th day of April, 1997.

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ JAN L. LUYMES
JAN L. LUYMES
Assistant United States Attorney
Senior Litigation Counsel
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 97-1479-WDK (Ex)

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

DECLARATION OF DARRELL M. JOSEPH

I, Darrell M. Joseph, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an Associate Independent Counsel in the Office of the Independent Counsel ("OIC") Kenneth W. Starr. I have held this position since November 5, 1997. One of my responsibilities is to review or supervise the review of OIC files in response to requests made under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"); and the Privacy Act, 5 U.S.C. § 552a, to determine whether such files contain records within the scope of a request and, if so, to ascertain what portions of those records can be made available to the requester.

2. The purpose of this declaration is to provide the Court with a *Vaughn* index for documents subject to plaintiff's FOIA request but withheld from disclosure, in accordance with *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); and *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). This declaration provides the Court and plaintiff with a narrative description of the material being withheld by OIC, which identifes each document

or portion thereof withheld, the statutory exemption claimed, and provides the justification for the assertion of FOIA exemptions used to withhold certain information contained in the records at issue.

3. This declaration consists of: (I) the relevant pre-litigation correspondence between plaintiff and OIC regarding plaintiff's FOIA request; (II) a description of the OIC's system of records searched pursuant to plaintiff's request; (III) a detailed explanation of the format used in this declaration for the justification of withheld or redacted materials; and (IV) the justifications for withheld or redacted materials.

4. Submitted with this declaration are the following exhibits. Exhibit I consists of copies of the relevant pre-litigation FOIA correspondence between plaintiff and OIC. Exhibit II consists of copies of the documents responsive to plaintiff's request, including redacted documents, where redactions were necessary. Exhibit III consists of narrative descriptions containing detailed identification and justification for each of OIC's withholdings.

I. HISTORY OF THE PROCESSING OF PLAINTIFF'S REQUEST

5(a). Set forth as Exhibits I-1 through I-4 to this declaration are copies of pre-litigation correspondence between plaintiff and OIC relating to plaintiff's FOIA request. Exhibit I-1 is the initial request from the plaintiff, dated January 6, 1997. Plaintiff seeks "[p]hotographs taken in connection with the investigation into the death of Vincent Foster." Plaintiff's letter specified what he described as ten categories of requested photographs. Exhibit I-2 is a copy of OIC's January 24, 1997 letter denying plaintiff's request,

pursuant to Exemptions 7(A) and 7(C) of the FOIA, 5 U.S.C. §§ 552(b)(7)(a) and 552(b)(7)(C), while reserving OIC's right to assert the applicability of other relevant exemptions, if warranted. Exhibit I-3 is a copy of plaintiff's appeal letter, dated January 28, 1997. Exhibit I-4 is a February 19, 1997 letter from John D. Bates, Deputy Independent Counsel, denying plaintiff's appeal, pursuant to Exemptions 7(A) and 7(C) of the FOIA, while reserving OIC's right to assert other applicable exemptions if the need should arise.

5(b). On October 10, 1997, Independent Counsel Kenneth W. Starr submitted his Report on the death of Vincent W. Foster, Jr. ("Report") to the United States Court of Appeals for the District of Columbia Circuit's Division for the purpose of Appointing Independent Counsels ("the Special Division").[1] By Order dated October 10, 1997, the Special Division permitted the Report to be released to the public. (In addition, an Appendix containing the comments or information submitted to the Special Division pursuant to 28 U.S.C. § 594 was released by the Special Division in the Special Division's Appendix.) Subsequent to the public release of the Report, OIC reviewed the documents responsive to plaintiff's request and, as a result of this review (and the fact that the investigation regarding Vincent Foster's death has been concluded), OIC is no longer asserting a (b)(7)(A) exemption to withhold information from the plaintiff. As I describe in detail below, certain limited information is being withheld pursuant to Exemptions (b)(3) or (b)(7)(C).

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[1] Vincent W. Foster, Jr. was Deputy Counsel to President Clinton. The Report concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

II. DESCRIPTION OF OIC's SYSTEM OF RECORDS SEARCHED AND RESULTS OF THE SEARCH

6(a). As noted above, plaintiff requested "photographs taken in connection with the investigation into the death of Vincent Foster," Exhibit I-1, and requested specific photographs which plaintiff attempted to identify in 10 categories. With the exception of categories 2 and 3, the plaintiff identified the photographs he sought as copies of certain photographs published in Volume II of *Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington, D.C. Phase*, 103d Cong. (1994) ("the Senate hearings Volume II"). In categories 2 and 3, the plaintiff did not correlate the photograph he sought with a specific photograph contained in the Senate hearings Volume II; instead the plaintiff sought the photographs listed on pg. 2112 of the Senate hearings volume II (which contains a photocopy of a Federal Bureau of Investigation "Receipt for Property Received/Returned/Released/ Seized" bearing certain handwriting listing certain photographs).

6(b). On August 5, 1994, after the enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed evidence gathered during prior investigations of Mr. Foster's death and conducted further investigations. The photographs which the plaintiff requested were compiled for law enforcement purposes, including the investigation into the death of Mr. Foster. The photographs are maintained in the OIC's Washington, D.C. office. In response to the plaintiff's request, the OIC searched for potentially responsive material. The results of that search and the defendant's response to each category is set forth in detail in paragraph 6(c) below.

6(c). Following a photocopy of the plaintiff's FOIA request, Exhibit II contains each of the ten categories of photographs as listed by the plaintiff, and each category is numerically identified by tabs 1 through 10. In order to assist the Court, for each page in the Senate hearings Volume II which bore photograph(s) requested by the plaintiff, a copy of the Senate Report page first appears. When there were multiple photographs contained on a page in the Senate hearings Volume II, on the photocopy of the Senate page was added a legend "A," "B," "C," or "D" as was appropriate to each of the photographs. Following the page from the Senate hearings Volume II, there appears the photograph(s), identified by page and "A, B, C, or D". Thus, the Court and the plaintiff can easily correlate the released, withheld, or redacted photographs with what has been requested. Extreme care has been taken in the reproduction of the photographs. The following

contains a summary of the photographs released, withheld in full, or withheld in part:

(1) As to Category 1, which requests photographs of a gun published on pages 2406-2412 and 2436 of Senate hearings Volume II:

4 photographs are released in full from page 2406;

4 photographs are released in full from page 2407;

4 photographs are released in full from page 2408;

4 photographs are released in full from page 2409;

4 photographs are released in full from page 2410;

4 photographs are released in full from page 2411;

4 photographs are released in full from page 2412; and Page 2436 (which contains a picture of a gun superimposed upon a handwritten document) is being released in full.

(2) As to Category 2, which requests "the photograph of a gun alleged to be of Mr. Foster's hand with a gun still in it" and as to which plaintiff has stated "this photograph appears to be the first Polaroid listed among the set of eight listed at the bottom of page 2112" of Senate hearings Volume II:

the defendant's response is found as part of defendant's response to request for Polaroid 1 from bottom section of page 2112, located in Tab 3. (It is being withheld in full pursuant to the (b)(7)(C) exemption.)

(3) As to Category 3, which requests the photographs listed on page 2112 of Senate hearings Volume

II, as noted above, this page is a photocopy of an Federal Bureau of Investigation "Receipt for Property Received/Returned/Released/Seized" bearing certain handwriting listing certain photographs. In Tab 3, a photocopy of the Receipt is reproduced. The listing of Polaroid photographs is broken into three sections: the top section which refernces 5 Polaroids, the middle section which references 5 Polaroids, and the bottom section which reference 8 Polaroids.

(I) As to the top section, the defendant is releasing in full the first Polaroid ("rear of cannon"), and the second Polaroid ("heavily foliaged area"). The third, fourth, and fifth Polaroids are being withheld in full pursuant to the (b)(7)(C) exemption.

(ii) As to the middle section, the defendant is releasing in full the first Polaroid ("driver seat"), the second Polaroid ("rear seat - driver side"), the third Polaroid ("read seat - passenger side"), and the fifth Polaroid ("rear of vehicle").

(iii) As to the bottom section, the defendant is withholding in full the 8 Polaroids pursuant to the (b)(7)(C) exemption.

(4) As to Category 4, which requests photographs of a gun and accompanying materials published on pages 2395-2399 of Senate hearings Volume II:

2 photographs are released in full from page 2395;

3 photographs (or their backs)[2] are released in full from page 2396;

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[2] When the photograph contained in the Senate hearing volume was the back of a photograph, the backs of the photograph were reproduced in Exhibit II to the extent that they could be

3 photographs (or their backs) are released in full from page 2397;

3 photographs (or their backs) are released in full from page 2398; and

3 photographs (or their backs) are released in full from page 2399.

(5) As to Category 5, which requests photographs published on pages 2388-2391 of Senate hearings Volume II:

3 photographs are released in full from page 2388; the back of 3 photographs are released in part from page 2389 and certain information is being withheld frm 2389A, 2389B, and 2389C pursuant to Exemption (b)(3);

2 photographs are released in full from page 2390; and the backs of 2 photographs are released in part from page 2391 and certain information is being withheld from 2391A and 2391B pursuant to Exemption (b)(3).

(6) As to Category 6, which requests photographs published on page 2392 of Senate hearings Volume II:

2 photographs are released in full from page 2392.

(7) As to Category 7, which requests photographs published on pages 2393-2394 of Senate hearings Volume II:

the backs of 3 Polaroids are released in part from page 2393 and certain information is being withheld

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identified. The plaintiff was asked whether he still wanted to have the backs of photographs produced and he indicated that he did.

from 2393A, 2393B, and 2393C pursuant to Exemption (b)(3); and the backs of 2 Polaroids are released in part from page 2394 and certain information is being withheld from 2394A and 2394B pursuant to Exemption (b)(3).

(8) As to Category 8, which requests photographs published on pages 2399-2405 of Senate hearings Volume II:

3 photographs are released in full from page 2399;

2 photographs are released in full from page 2400 and certain information is being withheld from photographs 2400C and 2400D pursuant to Exemption (b)(7)(C);

2 photographs are released in full from page 2401 and certain information is being withheld from photographs 2401A and 2401B pursuant to Exemption (b)(7)(C);

Certain information is being withheld from photographs 2402A, 2402B, 2402C and 2402D pursuant to Exemption (b)(7)(C);

2 photographs are released in full from page 2403, and certain information is being withheld from photographs 2403A and 2403B pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2404; and

4 photographs are released in full from page 2405.

(9) As to Category 9, which requests photographs published on pages 2413-2424 of Senate hearings Volume II:

4 photographs are released in full from page 2413;

4 photographs are released in full from page 2414;

2 photographs are released in full from page 2415 and certain information is being withheld from photographs 2415C and 2415D pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2416;

4 photographs are released in full from page 2417;

4 photographs are released in full from page 2418;

4 photographs are released in full from page 2419;

4 photographs are released in full from page 2420;

4 photographs are released in full from page 2421;

2 photographs are released in full from page 2422 and certain information is being withheld from photographs 2422A and 2422B pursuant to Exemption (b)(7)(C);

4 photographs are released in full from page 2423; and

4 photographs are released in full from page 2424.

(10) As to Category 10, which requests photographs published on pages 2425-2428 of Senate hearings Volume II:

Each page contained in Senate hearings Volume II at 2425-2428 contains the copy of the backs of 2 photographs, for a total of the backs of 8 photographs. After extensive comparison, it is not possible to definitively match the backs of photographs with the backs as photocopied in the Senate hearings Volume II. Therefore, all 8 backs appear in Tab 10 without a page correlation. As to each of the backs, certain information has been withheld from each of the 8 backs pursuant to the (b)(3) exemption.

6(d). In summary, a total of 118 photographs or Polaroids (or their backs) have been released in full, 11 Polaroids have been withheld in full pursuant to the (b)(7)(C) exemption, information from 18 photographs (or their backs) has been withheld pursuant to the (b)(3) exemption, and information from 14 photographs (or their backs) has been withheld pursuant to the (b)(7)(C) exemptions.

III. EXPLANATION OF FORMAT USED FOR JUSTIFICATION OF WITHHELD MATERIAL

7. For the Court's information, I thoroughly reviewed the responsive photographs described in paragraph 6, above. As noted, portions of certain photographs or backs of photographs, and certain photographs in their entirety, are being withheld by OIC pursuant to one of two FOIA exemptions: (b)(3) and (b)(7)(C). The categories, which are described below, describe the statutory exemption asserted, the rationale for claiming the exemption, and the subject matter of the asserted exemptions. Copies of the redacted records (*see* Exhibit II) are labeled with the relevant coded categories of exemptions. The coded categories identify the nature of the information withheld under

FOIA. In addition, OIC has provided a separate narrative description (*see* Exhibit III) identifying each document or portion thereof being withheld, the exemption claimed, and the justification for withholding the information.

8. A summary of the exemption categories is provided below:

Category (b)(3)	Records Specifically Exempted from Disclosure by Statute
Category (b)(7)(C)	Records or Information Compiled for Law Enforcement Purposes which could Reasonably be Expected to Constitute an Unwarranted Invasion of Personal Privacy

9. Exemptions claimed by OIC fall into two categoriesA: (b)(3) and (b)(7)(C). The narrative descriptions for the information being withheld are found in Exhibit III. The narrative descriptions (which also refer back to paragraphs in this declaration) and coded categories are being used to aid the Court's review of OIC's explanations or FOIA exemptions used to withhold the protected material. Describing the information withheld by OIC in more detail, in this declaration and in the narrative descriptions in Exhibit III, could identify the material OIC seeks to protect. No reasonably segregable, non-exempt portions have been withheld from the plaintiff. Accordingly, all information withheld is exempt from disclosure pursuant to a FOIA exemption.

IV. JUSTIFICATION FOR WITHHELD MATERIALS

10. Plaintiff is being provided with the maximum disclosure authorized by law. This specific FOIA exemptions under which information was withheld by OIC are discussed below.

(A) Title 5 U.S.C. § 552(b)(3). Information Specifically Exempted from Disclosure By Statute.

11. Title 5 U.S.C. § 552(b)(3) allows the withholding of information specifically exempted from disclosure by statute if such exempting statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

12. Fed. R. Crim. P. 6(e), which prohibits the disclosure of "matters occurring before the grand jury," is an exempting statute within the meaning of Exemption (b)(3) of the FOIA. The investigations conducted into the death of Mr Foster included, among other things, the adducing of evidence before the federal grand jury in Washington, D.C. *See* Report at 2.

13. Information relating to matters before the grand jury has been redacted from the backs of certain photographs, pursuant 2426A; 2426B; 2427A; 2427B; 2428A; 2428B.)[3] Disclosure of the withheld information

[3] It should be noted that the information being withheld from the backs of these identified photographs pursuant to Exemption (b)(3) was not affixed to the photographs at the time of the Senate hearings. To the extent that the plaintiff has requested the photographs as they existed in the Senate hearings Volume II, the information was not in existence at that time and therefore the

would reveal what evidence was presented to the grand jury.

(B) Title 5 U.S.C. § 552(b)(7)(C). Records or Information Compiled for Law Enforcement Purposes which Could Reasonably be Expected to Constitute an Unwarranted Invasion of Personal Privacy.

14. Title 5 U.S.C. § 552(b)(7)(C) exempts from release records or information compiled for law enforcement purposes, disclosure of which reasonably could be expected to constitute an unwarranted invasion of personal privacy.

15. In asserting this exemption, the withheld information was evaluated to determine the nature and strength of the privacy interest of any individual whose name and/or identifying data appears in the photographs at issue. In withholding the information, the individual's privacy interest was balanced against the public's interest in disclosure. In each instance where information was withheld, it was determined that the individual did have a privacy interest and that the individual's privacy interests were not outweighed by any public interest in disclosure. Disclosure of names and identifying information and data relating to third parties would not shed light on how the government performs its statutory duties. When the documents at issue were reviewed for purposes of preparing this declaration, the passage of time and any effect on third-party privacy interests were considered. It was determined that the privacy interests are as strong—if not stronger—now than when the records were created. To reveal names and other personal identifying infor-

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information being withheld is outside the scope of the plaintiff's FOIA request.

mation in the context of these records could reasonably be expected to cause embarrassment, potential harassment and emotional anguish.

16. Exemption (b)(7)(C) was asserted to withhold the names and identifying information of third parties (Foster family and non- family members) who were not the subject of investigation in Document Nos. 2400C; 2400D; 2401A; 2401B; 2415C; 2415D. The names and identifying information were withheld to protect the relevant individuals from unnecessary harassment, nuisance and emotional and mental anguish. The identification of these individuals, particularly in connection with Mr. Foster's death, could cause them embarrassment, humiliation or unwarranted public attention. Disclosure of this information would, thus, result in an unwarranted invasion of those individuals' personal privacy.

17. Exemption (b)(7)(C) was also asserted to withhold nine (9) post-mortem photographs of Mr. Foster's face and/or body. OIC invokes the same exemption to withhold one (1) photograph depicting, post-mortem, Mr. Foster's right hand clutching a gun; and one (1) photograph of Mr. Foster's eyeglasses, lying on the ground near his body. Thus, a total of eleven (11) photographs are being withheld in full pursuant to Exemption (b)(7)(C). These photographs sought by the plaintiff are graphic, explicit, and extremely upsetting. The privacy interest being asserted is that of Vincent Foster's family members. Disclosure of the foregoing photographs would cause Mr. Foster's surviving family members a great deal of anguish well beyond that which they have already suffered, and thus would constitute an unwarranted invasion of their personal privacy. (*See* Document No. 2112, Top Section, Polaroid

Nos. 3-5; Document No. 2112, Bottom Section, Polaroid Nos. 1-8).

18. Finally, Exemption (b)(7)(C) was asserted to withhold from eight photographs certain matter pertaining to Foster family members. (*See* Document Nos. 2402A; 2402B; 2402C; 2402D; 2403A; 2403B; 2422A; 2422B.) Disclosure of these items in the form called for by Mr. Favish's FOIA request would cause Mr. Foster's surviving family members additional anguish, and thus, as is the case with the material described in paragraph 17, above, would constitute an unwarranted invasion of their personal privacy.

I declare under penalty of perjury the foregoing information is true and correct to the best of my knowledge and belief.

Dated this 2d day of January, 1998, at the Office of the Independent Counsel, Washington, D.C.

/s/ DARREL M. JOSEPH
DARRELL M. JOSPEH
Associate Independent Counsel

EXHIBIT III

* * * * *

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 3

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 4

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Top Section, Polaroid 5

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tabs 2 and 3

Document: 2112, Bottom Section, Polaroid 1

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's right hand. In his hand is a gun. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs it[s] statutory duties. The material is therefore exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

* * * * *

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 3

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 4

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 5

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 6

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 7

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

Exhibit: II, Tab 3

Document: 2112, Bottom Section, Polaroid 8

Date of Document: Not applicable

Total Number of pages: 1

Type of Document: Photograph

Nature of Withholding: Withheld in Entirety

The material withheld is a photograph of Mr. Foster's body in Fort Marcy Park. Disclosure of this photograph would cause Mr. Foster's surviving family members a great deal of anguish and reasonably can be expected to constitute an unwarranted invasion of their personal privacy. The disclosure of this graphic picture would shed no light on how the government performs its statutory duties. The material therefore is exempt from disclosure under FOIA Exemption (b)(7)(C). (*See* Joseph Decl. ¶¶ 15, 17.)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV-97-1479-WDK (Ex)

ALAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

SUPPLEMENTAL DECLARATION OF DARRELL M. JOSEPH

I, Darrell M. Joseph, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an Associate Independent Counsel in the Office of the Independent Counsel ("OIC") Kenneth W. Starr. I have held this position since November 5, 1997. One of my responsibilities is to review or supervise the review of OIC files in response to requests made under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"); and the Privacy Act, 5 U.S.C. § 552a, to determine whether such files contain records within the scope of a request and, if so, to ascertain what portions of those records can be made available to the requester.

2. The purpose of this declaration is to correct a word processing error which was just noted as to paragraph 13 of my Declaration filed on January 5, 1998. In re-reading paragraph 13 (beginning at page 14 and continuing onto the top of page 15), it became clear that two lines (which had appeared in the text which I had written) were lost during the final printing of my

Declaration. The two lines which are missing (and which should have appeared after the last word on page 14) identify exemption being asserted and identify other documents (in addition to those listed on page 15) in which a (b)(3) exemption was asserted. Paragraph 13 should read:

13. Information relating to matters before the grand jury has been redacted from the backs of certain photographs, pursuant to FOIA Exemption (b)(3). (*See* Document Nos. 2389A; 2389B; 2389C; 2391A; 2391B; 2393A; 2393B; 2393C; 2394A; 2394B; 2425A; 2425B; 2426A; 2426B; 2427A; 2427B; 2428A; 2428B.)[3] Disclosure of the withheld information would reveal what evidence was presented to the grand jury.

I declare under penalty of perjury the foregoing information is true and correct.

Dated this 22nd day of January, 1998, at the Office of the Independent Counsel, Washington, D.C.

/s/ DARRELL M. JOSEPH
DARRELL M. JOSEPH
Associate Independent Counsel

[3] It should be noted that the information being withheld from the backs of these identified photographs pursuant to Exemption (b)(3) was not affixed to the photographs at the time of the Senate hearings. To the extent that the plaintiff has requested the photographs as they existed in the Senate hearings Volume II, the information was not in existence at that time and therefore the information being withheld is outside the scope of the plaintiff's FOIA request.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CV 97-1479-WDK(Ex)

ALLAN J. FAVISH, PLAINTIFF

v.

OFFICE OF THE INDEPENDENT COUNSEL, DEFENDANT

Filed: February 11, 1998

STIPULATION TO DISMISS WITH PREJUDICE CLAIMS AS TO INFORMATION WITHHELD PURSUANT TO EXEMPTION (b)(3) AND CLAIMS AS TO CERTAIN INFORMATION WITHHELD PURSUANT TO (b)(7)(C) AND IDENTIFICATION OF WHAT REMAINS AT ISSUE; ORDER THEREON

COMES NOW plaintiff Allan J. Favish, who appears in propria persona, and defendant Office of the Independent Counsel, by and through the undersigned counsel, who stipulate, and respectfully request the Court to so order, that all of plaintiff's claims as to all information withheld pursuant to 5 U.S.C. § 552(b)(3) ("Exemption (b)(3)") [which information is located in photographs identified in this action in Category 5 as Documents 2389A, 2389B, 2389C, 2391A, 2391B, in Category 7 as Documents 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Documents in Category 10, which

were identified as Documents 2425A, 2425B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B] and the plaintiff's claims as to information withheld pursuant to 5 U.S.C. § 552(b)(7)(C) ("Exemption (b)(7)(C)") [which information is located in photographs identified in this action in Category 8 as Documents 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Documents 2415C, 2415D, 2422A, 2422B] be dismissed with prejudice.

To assist the Court, the parties hereby identify the Documents which the plaintiff still contests: the photographs (withheld in their entireties) identified in this action in Category 3 in Document 2112, Top Section, Polaroids 3, 4 and 5 and in Document 2112, Bottom Section, Polaroids 1, 2, 3, 4, 5, 6, 7, and 8. These photographs are being withheld in their entireties pursuant to 5 U.S.C. § 552(b)(7)(C). With regard to these photographs, the parties stipulate that these photographs were compiled for law enforcement purposes (the threshold requirement for a (b)(7) exemption). The only issue left to be resolved with regard to this exemption is whether the disclosure of these photographs could reasonably be expected to constitute an unwarranted invasion of personal privacy. In addition, for all unredacted portions of photos released by defendant, plaintiff claims that defendant is required to produce color copies of those uredacted portions if they were originally in color. While the defendant does not agree that this is an appropriate issue, plaintiff reserves this as an issue to be litigated.

DATED: This 5th day of February, 1998.

/s/ ALLAN J. FAVISH
ALLAN J. FAVISH
Plaintiff in propria persona

DATED: This 9th day of February, 1998.

NORA M. MANELLA
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ JAN L. LUYMES
JAN L. LUYMES
Assistant United States Attorney
Senior Litigation Counsel
Attorneys for Defendant

ORDER

IT IS SO ORDERED that all of plaintiff's claims in this action as to all information withheld pursuant to 5 U.S.C. § 552(b)(3) (which information is located in photographs identified in this action in Category 5 as Documents 2389A, 2389B, 2389C, 2391A, 2391B, in Category 7 as Documents 2393A, 2393B, 2393C, 2394A, 2394B, and all of the Documents in Category 10, which were identified as Documents 2425A, 2424B, 2426A, 2426B, 2427A, 2427B, 2428A, 2428B), and the plaintiff's claims as to information withheld pursuant to 5 U.S.C. § 552(b)(7)(C) (which information is located in photographs identified in this action in Category 8 as Documents 2400C, 2400D, 2401A, 2401B, 2402A, 2402B, 2402C, 2402D, 2403A, 2403B, and in Category 9 as Documents 2415C, 2415D, 2422A, 2422B) are hereby dismissed with prejudice.

Dated: This 11th day of Feb., 1998.

/s/ WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

No.

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

AMENDED DECLARATION OF LISA FOSTER MOODY

My name is Lisa Foster Moody. I was married to Vincent W. Foster, Jr. for 25 years until he committed suicide on July 20, 1993.

His death and the manner in which he died totally devastated our family. Having to deal with all the media attention was incredibly difficult. Indeed, there have been telephone calls from the press and reporters knocking on my door as recently as last summer. If these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again.

There have been five major investigations of Vince's death—by the Park Police, by two independent counsels, Robert Fiske and Kenneth Starr, and by two congressional committees chaired by Rep. Clinger and Sen. D'Amato. I personally appeared for interviews in

Washington D. C. for three of these investigations. My children, Vincent III, Laura and Brugh, also flew to Washington from Little Rock to be questioned individually by Kenneth Starr, his team of investigators and several FBI agents. All of these investigations ended with the same conclusion—that Vince committed suicide. The family cooperated fully with these investigations. From the moment I was told that he had killed himself, I have never had any doubts about his suicide.

Now that the investigations are concluded, my family is in the process of healing and restoring our lives to some degree of normalcy. I have remarried and my husband and I are seeking to meld our families into one. We do not need the set back that release of the photos would cause and frankly we do not deserve it. We have generally dealt with our grief in private and have declined all of the many requests for television interviews. The privacy we have sought to maintain has been our salvation. I beg the Court not to destroy what we have worked so hard to accomplish by releasing graphic photographs of Vince in response to what we consider a cruel, insensitive request that we believe is unsupported by any valid public interest.

I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. It is inconceivable to me how the misguided,

twisted curiosity of a stranger could justify my children having to see pictures of their dead father on the nightly news, on the Internet and on the supermarket shelves.

I respectfully implore the Court to be sensitive to the wishes of the members of our family and our wholly-legitimate privacy concerns and to reconsider releasing these photographs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Feb. 7, 2001, at Pulaski County, Arkansas

/s/ LISA FOSTER MOODY
Lisa Foster Moody

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

No.

ALLAN J. FAVISH, PLAINTIFF

SHEILA FOSTER ANTHONY; LISA FOSTER MOODY, INTERVENORS

v.

OFFICE OF INDEPENDENT COUNSEL, DEFENDANT

AMENDED DECLARATION OF SHEILA FOSTER ANTHONY

I am the sister of Vincent Foster who took his life on July 20, 1993. I have read the Court's January 12, 2001 decision and order in *Allan J. Favish v. Office of Independent Counsel*, CV 97-1478-WDK, listing the photographs it intends to release. More than ever before, I fervently believe that releasing any photographs depicting Vince's body post-mortem would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family.

Our family has suffered a great loss under extremely tragic circumstances, compounded by the barrage of newspaper, magazine, and Internet articles, books, and television programs and reports that followed Vince's death. An intensely private matter drew national

attention. Reporters, as well as simply curious individuals, harassed my grieving family in unbelievably insensitive ways. Conspiracy theorists imagined and caused to be printed and published all sorts of wild and unsubstantiated stories, alleging murder, treason, Swiss Bank accounts, high-level and widespread cover-up of government wrongdoing, and other such ravings. Political and commercial opportunists used Vince's death to publish films and articles through media of tabloids, video, and on the Internet to speculate about and sensationalize his tragic suicide and to profit from it. Seemingly countless official investigations of his death ensued, and my sister and I, as well as Vince's wife and children, were called before government agents to be interviewed and to testify about, and painfully re-live, the events surrounding his death. My now 86 year old mother and my sister received middle-of-the-night calls from authors pretending to be Vince's friend and seeking any personal tidbit of information about Vince from them. We found flowers on his grave with handwritten notes from strangers asserting that he had been murdered. I was sent a book authored by a conspiracy theorist who stated that Vince had been murdered and warned that my life could be in danger.

Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again, and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but

her grief (and ours) has been compounded by the fear that she will see upsetting reports, about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. It is my ardent desire to protect my family as well as myself from additional torment which would result from the release of these graphic photographs.

I fear that the release of these photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage. I cannot adequately express how truly unjust, unfair and cruel it would be to subject my family to more public scrutiny and the dissemination of these photographs via the Internet or by other print and electronic media. Although I have struggled to read the description of the photographs at issue here, I could not bring myself to view them. The horror of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause me extreme mental anguish. No member of my family should ever be concerned with the possible exposure of photographs of this nature.

The death of my brother has been more than adequately investigated. Five separate government inquiries have determined that Vince's death was a result of a self-inflicted gun wound. Therefore, I cannot fathom a legitimate or rational reason why these photographs should be released. The mere suggestion that these photographs would be released is unconscionable. Their release would only bring more agony to my family.

We have endured enough pain and personal invasion by the media and by those who investigated the death of my brother. While I have tried here, I have no adequate words to express the anguish the release of these photographs would bring to me and the entire Foster family.

The Government has asked the Court to uphold its position that the release of the photographs would be an unwarranted invasion of my personal privacy and that of Vince's family. I implore the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from the release of these photographs. Indeed, I beg the Court to place these photographs under permanent seal so that we will not continually, in forum after forum, be required to hire legal counsel and make these requests to the courts.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Feb. 9, 2001, at Washington, DC

/s/ SHEILA FOSTER ANTHONY
Sheila Foster Anthony

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF
VINCENT W. FOSTER, JR.,
BY THE OFFICE OF INDEPENDENT COUNSEL
IN RE: MADISON GUARANTY SAVINGS & LOAN
ASSOCIATION

Filed for Comments:
July 15, 1997

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UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division (94-1) for the Purpose of
Appointing Independent Counsels

REPORT ON THE DEATH OF VINCENT W. FOSTER, JR., BY THE OFFICE OF INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION

I. INTRODUCTION

In accordance with 28 U.S.C. § 594(h), the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

On July 20, 1993, police and rescue personnel were called to Fort Marcy Park in suburban Northern Virginia. They found Mr. Foster lying dead with a gun in his right hand and gunshot residue-like material on that hand. There were no signs of a struggle. There was a gunshot wound through the back of his head and blood under his head and back. The autopsy determined that Mr. Foster's death was caused by a gunshot through the back of his mouth exiting the back of his

head. The autopsy revealed no other wounds on Mr. Foster's body.

The police later learned that Mr. Foster had called a family doctor for antidepressant medication the day before his death. He had told his sister four days before his death that he was depressed, and she had given him the names of three psychiatrists. He had written in the days or weeks before his death that he "was not meant for the job or the spotlight of public life in Washington. Here, ruining people is considered sport."

Two law enforcement investigations—the initial United States Park Police investigation and a subsequent investigation conducted under the direction of regulatory Independent Counsel Robert B. Fiske, Jr.—concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Two inquiries in the Congress of the United States reached the same conclusion. After analysis of the evidence gathered during those investigations, and further investigation including adducing evidence before the federal grand jury in Washington, D.C., the OIC likewise has concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

The OIC's conclusion is based on analyses and conclusions of a number of experienced experts and criminal investigators retained by the OIC. They include Dr. Brian D. Blackbourne, a forensic pathologist who is the Medical Examiner for San Diego County, California; Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Alan L. Berman, an expert suicidologist who currently is Executive Director of the American Association of Suicidology; and several experienced

investigators with extensive service in the Federal Bureau of Investigation (FBI) and other law enforcement agencies. These experts and investigators reviewed the evidence gathered during the prior investigations and conducted further investigation as necessary.

Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[1] Dr. Lee reported that "[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide. The location where Mr. Foster's body was found is consistent with the primary scene," that is, the location where he committed suicide.[2] Dr. Berman stated that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[3] OIC investigators concurred, based on investigation and analysis of the evidentiary record, that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

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[1] Report to the Office of the Independent Counsel Concerning the Death of Vincent Foster, submitted by Dr. Brian D. Blackbourne, M.D., at 5 (Blackbourne Report).

[2] Forensic Report to the Independent Counsel In Re Vincent W. Foster, Jr., submitted by Dr. Henry C. Lee, Ph.D., at 495 (Lee Report).

[3] Report to the Office of Independent Counsel, submitted by Dr. Alan L. Berman, Ph.D., at 15 (Berman Report).

II. BACKGROUND

A. 1993 Park Police Investigation

Because Mr. Foster's body was found in Fort Marcy, a park maintained by the National Park Service, the United States Park Police conducted the investigation of his death.[4] On the night of the death (July 20, 1993), Mr. Foster's body was transported to Fairfax County Hospital in Fairfax, Virginia. The next day, Dr. James C. Beyer, Deputy Chief Medical Examiner, Northern Virginia District of the Virginia Office of the Chief Medical Examiner, conducted an autopsy in the presence of an assistant and four Park Police officers.

The FBI assisted the Park Police in certain aspects of the ensuing death investigation, as did other federal and Virginia agencies. Moreover, the FBI, at the direction of the Department of Justice, opened a separate investigation of possible obstruction of justice after a note was reportedly found on Monday, July 26, 1993, in Mr. Foster's briefcase at the White House.

On August 10, 1993, the Department of Justice, FBI, and Park Police jointly announced the results of the death and note investigations. The Park Police concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Robert Langston, Chief of the Park Police, explained:

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[4] *See* 16 U.S.C. § 1a-6(b). The FBI has mandatory jurisdiction to investigate possible murders of certain high-ranking individuals employed in the White House—those appointed under Section 105(a)(2)(A) of title 3 employed in the Executive Office of the President. *See* 18 U.S.C. § 1751(a) (defining persons covered by statute). Mr. Foster was appointed under Section 105(a)(2)(B) and thus was not an official covered by Section 1751. OIC Doc. No. DC-210-5151.

> The condition of the scene, the medical examiner's findings and the information gathered clearly indicate that Mr. Foster committed suicide. Without an eyewitness, the conclusion of suicide is deducted after a review of the injury, the presence of the weapon, the existence of some indicators of a reason, and the elimination of murder. Our investigation has found no evidence of foul play. The information gathered from associates, relatives and friends provide us with enough evidence to conclude that Mr. Foster's—that Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life.[5]

Based on the evidence the FBI gathered in its investigation, the Department of Justice did not seek criminal charges for obstruction of justice relating to the handling of the note.[6]

B. 1994 Fiske Investigation

In 1992 and 1993, the Resolution Trust Corporation (RTC) examined the operations of Madison Guaranty Savings & Loan, a defunct savings and loan in Little Rock, Arkansas, that had been operated by James and Susan McDougal. The McDougals also had been partners with William Jefferson Clinton and Hillary Rodham Clinton in an Arkansas real estate venture known as the Whitewater Development Company. In October 1993, the RTC sent nine criminal referrals to

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[5] Federal News Service (August 10, 1993).

[6] *Id.*

the United States Attorney's Office in Little Rock concerning the activities of Madison Guaranty.[7]

Also in 1993, the FBI investigated the activities of Capital Management Services, Inc., a small business investment company in Little Rock that had been operated by David L. Hale. Mr. Hale was indicted by a federal grand jury in the Eastern District of Arkansas on September 23, 1993.

Both the Hale prosecution and the Madison investigation were transferred in November 1993 from the United States Attorney's Office in Little Rock to the Fraud Section of the Department of Justice in Washington. On December 20, 1993, the White House confirmed that Whitewater-related documents had been in Mr. Foster's White House office at the time of his death. On January 12, 1994, President Clinton asked Attorney General Reno to appoint an independent counsel, and on January 20, 1994, the Attorney General appointed Robert B. Fiske, Jr., to take over the investigation.

Mr. Fiske's jurisdictional mandate vested him with authority to investigate whether any individuals or entities committed federal crimes "relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services." After his appointment, Mr. Fiske took over both the Hale prosecution and the continuing Madison investigation.

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[7] In September 1992, the RTC sent one criminal referral regarding Madison Guaranty to the United States Attorney's Office in Little Rock.

Mr. Fiske also opened a new investigation of Mr. Foster's death, utilizing FBI resources and a panel of distinguished and experienced pathologists. On June 30, 1994, Mr. Fiske issued a report concluding that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide in Fort Marcy Park on July 20, 1993."[8]

C. Congressional Inquiries

On February 24, 1994, Congressman William F. Clinger, Jr., then the Ranking Republican on the Committee on Government Operations of the United States House of Representatives, initiated a probe into the death of Mr. Foster. Mr. Clinger's staff interviewed emergency rescue personnel, law enforcement officials, and other persons involved in the Park Police investigation of Mr. Foster's death.[9] Mr. Clinger's staff obtained access to the Park Police reports and to photographs taken at the scene and at the autopsy.[10] Mr. Clinger issued a report on August 12, 1994, concluding that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."[11]

The United States Senate Committee on Banking, Housing, and Urban Affairs conducted an inquiry into the Park Police investigation of Mr. Foster's death.

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[8] Report of the Independent Counsel Robert B. Fiske, Jr., In Re Vincent W. Foster, Jr. at 58 (June 30, 1994) (Fiske Report).

[9] Summary Report by William F. Clinger, Jr., Ranking Republican, Committee on Government Operations, U.S. House of Representatives, on the Death of White House Deputy Counsel Vincent W. Foster, Jr., at 1 (Aug. 12, 1994).

[10] *Id.*

[11] *Id.* at 6.

The Committee concluded its inquiry with a report issued on January 3, 1995, stating that "[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self- inflicted gun shot wound to the upper palate of his mouth."[12] The additional views of Senators D'Amato, Faircloth, Bond, Hatch, Shelby, Mack, and Domenici stated that "[w]e agree with the majority's conclusion that on July 20, 1993 Vincent Foster took his own life in Fort Marcy Park."[13]

D. Appointment of the Independent Counsel

On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."

Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIC, the OIC reviewed and analyzed the evidence gathered during

[12] S. Rep. No. 103-433, at 4 (Jan. 3, 1995).

[13] *Id.* at 51.

prior investigations of Mr. Foster's death and conducted further investigation.

III. OVERVIEW

A. Scrutiny

The gunshot death of a high-ranking White House lawyer who had been a law partner of the First Lady of the United States and friend to both the President and the First Lady was bound to be heavily scrutinized—and it has been. Many persons have publicly identified specific issues regarding Mr. Foster's death that, in their view, might raise broader questions about the ultimate conclusion that Mr. Foster committed suicide in Fort Marcy Park. Those questions have arisen and to some extent persisted for many of the same reasons that numerous suicides are questioned. In this case, as in many suicides, no identified eyewitness saw Mr. Foster commit suicide, and Mr. Foster apparently did not leave a suicide note (that is, a note that specifically refers to or contemplates suicide).[14]

The primary issues that have been raised regarding the cause and manner of Mr. Foster's death can be grouped into several broadly defined categories: (1) forensic issues; (2) apparent differences in statements of private witnesses, Park Police personnel, and Fairfax County Fire and Rescue Department (FCFRD) per-

[14] The great majority of individuals committing suicide do *not* leave a note. *See, e.g.*, Berman Report at 15; A. Leenaars, *Suicide Notes, Communication, and Ideation* in *Assessment and Prediction of Suicide* (R. Maris, A. Berman, J. Maltsberger & R. Yufit eds. 1992) (12-15% of suicide victims leave note); A. Berman, *Suicide Notes and Communications* in *Comprehensive Textbook of Suicidology and Suicide Prevention* (R. Maris, A. Berman & M. Silverman eds.) (forthcoming).

sonnel regarding their activities and observations at Fort Marcy Park on July 20; (3) physical evidence (such as the fatal bullet) that could not be recovered; and (4) the conduct of the Park Police investigation and the autopsy.[15]

B. OIC Personnel

To ensure that these issues were fully considered, carefully examined, and properly assessed in analyzing the cause and manner of Mr. Foster's death, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman.

Dr. Blackbourne has been County Medical Examiner for San Diego County, California, since 1990. He was Chief Medical Examiner for the Commonwealth of Massachusetts from 1983 to 1990; Deputy Chief Medical Examiner in Washington, D.C., from 1972 to 1982; and Assistant Medical Examiner in Metropolitan Dade County, Florida, from 1967 to 1972. He has taught and written widely, and has testified in court on numerous occasions. He has performed over 5,500 autopsies, over 700 of which have involved gunshot wounds. The autopsies have included over 800 homicides and over 700 suicides. He is a Fellow of the American Academy of Forensic Sciences and a member of the National Association of Medical Examiners.

Dr. Lee has served as Director of the Connecticut State Police Forensic Science Laboratory since 1980.

[15] Numerous individuals, including members of the news media, analyzed the information made public by the Senate after its inquiry and published or sent the OIC theories, articles, and reports. OIC investigators have reviewed that sizeable body of information and have taken it into account.

He has numerous professional affiliations and has served as a consultant to a variety of organizations. He has received over 400 awards and commendations, including a 1986 Distinguished Service Award and a 1994 Distinguished Fellow Award from the American Academy of Forensic Sciences. He has been qualified in many state and federal courts as an expert witness or an expert involved in forensic science, forensic serology, bloodspatter analysis, crime scene investigation, crime scene profiling, crime scene reconstruction, fingerprints, imprints, and general physical evidence. He has written or edited many books and articles, including *Physical Evidence* (1995), *Crime Scene Investigation* (1994), *Physical Evidence and Forensic Science* (1985), and *Physical Evidence and Crime Scene Investigation* (1983).

Since 1995, Dr. Berman has been Executive Director of the American Association of Suicidology. He was President of that Association in 1984-85. From 1991 to 1995, he was Director of the National Center for the Study and Prevention of Suicide. Since 1971, he has engaged in the private practice of psychotherapy and psychological consultation. In 1982, he received the Edwin S. Shneidman Award for outstanding contribution in research by the American Association of Suicidology. He has taught and written extensively on the subject of suicide, and has testified before committees of the United States House of Representatives and the United States Senate. He is a Distinguished Adjunct Professor of Psychology at the American University in Washington, D.C., and was a tenured professor in the Department of Psychology from 1979 to 1991. He was co-editor of *Assessment and Prediction of Suicide* (1992). He has been a Consulting Editor of

the journal *Suicide and Life-Threatening Behavior* since 1981.

OIC investigators who worked with these outside, independent experts included an FBI agent detailed from the FBI-MPD[16] Cold Case Homicide Squad in Washington, D.C. Agents with the Cold Case Squad work with MPD homicide detectives in reviewing and attempting to solve homicides that have remained unsolved for more than one year. Another OIC investigator has extensive homicide experience as a detective with the MPD in Washington, D.C., for over 20 years. Two other OIC investigators assigned to the Foster death matter have experience as FBI agents investigating homicides of federal officials and others.[17]

C. Methodology

The OIC devoted substantial effort to gathering, examining, and analyzing evidence to render as conclusive a determination as possible of the cause and manner of Mr. Foster's death. In this kind of investigation—a reconstruction based in part on evidence gathered and tested during prior investigations—the important information in assessing the cause and manner of death includes testimonial, documentary, and photographic evidence relating to the scene and the autopsy; physical and forensic evidence gathered at the scene and the autopsy; a variety of tests and analyses of the evidence; and testimonial and documentary evi-

[16] "MPD" refers to the Metropolitan Police Department of Washington, D.C.

[17] These investigators did not work on previous investigations of Mr. Foster's death.

dence revealing the decedent's activities and state of mind in the days and weeks before his death[18]

In particular, the OIC obtained information gathered during the prior investigations of Mr. Foster's death, including physical evidence; photographs taken at the scene and the autopsy; and incident reports, interview reports, and other documents produced or gathered by the Park Police, the FCFRD, the FBI, and Mr. Fiske's office. The OIC questioned the known and identified civilian witnesses who were in Fort Marcy Park in the late afternoon of July 20, the Park Police and FCFRD personnel who responded to Fort Marcy Park, and the medical personnel who were involved in the Foster matter. Many of these persons were questioned before the federal grand jury.[19]

As to forensic information, the OIC attempted to obtain certain physical and forensic evidence in addition to that which had been gathered in prior investigations. Experts retained by the OIC reviewed and examined the evidence. Dr. Lee reviewed and studied scene and autopsy photographs and documentation; studied, reexamined, and tested physical evidence; reviewed FBI Laboratory tests and the autopsy results; met with FBI Laboratory personnel and Dr. Beyer, the medical examiner who conducted the autopsy; and toured and examined the Fort Marcy Park scene. Dr. Lee submitted

[18] *See Crime Scene Investigation* (Lee ed. 1994); *see also Practical Homicide Investigation* (Geberth ed. 1996).

[19] The OIC also took appropriate steps to inquire into all allegations and information it received.

a report summarizing his work on the physical and forensic evidence and setting forth his analysis.[20]

Dr. Blackbourne reviewed the relevant reports and the scene and autopsy photographs; reviewed microscopic slides; examined the Fort Marcy Park area; and interviewed Dr. Beyer, Dr. Haut (the medical examiner who responded to the Fort Marcy scene on July 20), and FBI and Virginia laboratory personnel. Dr. Blackbourne prepared a report summarizing his work on the forensic issues and setting forth his analysis.

As to information regarding Mr. Foster's activities and state of mind before his death, the OIC both reinterviewed certain persons who had been interviewed during prior investigations and interviewed persons not previously interviewed. These individuals included a variety of family members, friends, and associates who could potentially shed light on Mr. Foster's activities and state of mind. The OIC reviewed documents gathered in prior investigations, and sought and reviewed new documents.

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[20] As Dr. Lee explained, a perfect reconstruction of the circumstances of Mr. Foster's death was not possible at the time of the OIC's investigation. The reasons include the lack of complete documentation of the original shooting scene; the lack of subsequent records and photographs of each item of physical evidence prior to examination; the lack of x-rays of Mr. Foster's body from the autopsy; the lack of documentation of the amount of blood, tissue, and bone fragments in the areas at the scene under and around Mr. Foster's head; the lack of close-up photographs of any definite patterns and quantity of the bloodstains found on Mr. Foster's clothing and body at the scene; and the unknown location of the fatal bullet, which makes complete reconstruction of the bullet trajectory difficult. Lee Report at 485.

The OIC provided Dr. Berman with relevant state-of-mind information (the bulk of which consisted of interview reports and transcripts), which he studied and analyzed. Dr. Berman submitted a report to the OIC summarizing his work and providing his analysis.

The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, considering the analyses and conclusions of the OIC experts and investigators, and preparing this report.

D. Report

This report will describe the factual background; the forensic evidence and analyses, including the autopsy findings; the analysis of Dr. Lee; and the analyses and reports prepared by Dr. Blackbourne and the pathologists retained by Mr. Fiske's office. Above all, the Foster death case is a forensic matter, and the forensic evidence and analyses provide the foundation for the ultimate conclusion. The report then will discuss investigative work conducted with respect to other, specific issues. Finally, the report will summarize Dr. Berman's conclusions regarding Mr. Foster's state of mind.[21]

The OIC has filed this summary report with the Special Division of the United States Court of Appeals. Because of the secrecy restrictions of Federal Rule of Criminal Procedure 6(e), the OIC has not submitted the

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[21] The OIC's summary report is based on, among other sources, Dr. Lee's analysis, Dr. Blackbourne's analysis, Dr. Berman's analysis, and a number of internal OIC memoranda prepared by OIC personnel. Those documents were based on and incorporate grand jury information. The documents represent the work product of the OIC and were part of the OIC's deliberative process used to reach a decision on the Foster death matter.

report to the Congress or released it directly to the public.[22] The Special Division retains discretion to authorize public release of this report, and the OIC has prepared the report with the assumption that the Special Division, consistent with past practice, would see fit to authorize public release. While some descriptions of forensic evidence are necessarily graphic, the OIC has sought to comply with the 1994 Independent Counsel Reauthorization Act regarding the contents of reports.[23]

Some of the best evidence of the condition of Mr. Foster's body at the time of his death is contained in photographs taken by Park Police officers at Fort Marcy Park and in photographs taken at the autopsy. However, based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious.[24]

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[22] Because considerable testimonial evidence was gathered before the grand jury, the OIC filed a Rule 6(e) disclosure application permitting the inclusion of grand jury information in this report to the Court. *See In re North*, 16 F.3d 1234, 1244 (D.C. Cir. 1994). The Court granted that motion.

[23] The Conference Report stated that an independent counsel must exercise "restraint" in a report and that "the conferees want to make it clear that the final report requirement is not intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf. Rep. No. 103-511, at 19 (1994).

[24] *Cf., e.g., Navy Report Omits Suicide Notes*, N.Y. Times, Nov. 2, 1996, at 9 (regarding suicide of Admiral Boorda: "The Navy Department decided not to make the notes public. . . . Many other items in the report are blacked out, like the autopsy report and the identities of people interviewed by investigators."); *Katz v. National Archives and Records Administration*, 68 F.3d 1438, 1441 (D.C. Cir. 1995) ("Out of concern for the Kennedy family's privacy, . . . the x-rays and photographs did not become a part of the record of the Warren Commission.").

IV. FACTUAL SUMMARY

A. Mr. Foster's Background and Activities on July 20, 1993

Vincent W. Foster, Jr., was born on January 15, 1945, in Hope, Arkansas, to Alice Mae and Vincent W. Foster. He had two sisters, Sheila and Sharon. He was graduated from Hope High School in 1963 and from Davidson College in 1967. He married Elizabeth (Lisa) Braden in 1968, and they had three children, two boys and a girl. Mr. Foster was graduated first in his class from the University of Arkansas School of Law in 1971, where he was Managing Editor of the Law Review. He joined the Rose Law Firm in Little Rock in 1971 as an associate, and he became a Member of the Firm in 1974. Mr. Foster left the Rose Law Firm and moved to Washington in January 1993 to serve as Deputy White House Counsel.[25] He initially lived in Washington with his sister Sheila Anthony and her husband Beryl Anthony. Mrs. Lisa Foster moved to Washington in early June 1993, and the family lived in a house in the Georgetown section of Washington.

On the morning of Tuesday, July 20, 1993, six months into the Clinton Administration, Mr. Foster drove his gray Honda Accord to the White House from the house in Georgetown where he and his family were living. After dropping off his older son and his daughter on the way to work, Mr. Foster arrived at the suite on the

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[25] President and Mrs. Clinton had long-standing friendships with Mr. Foster. President Clinton and Mr. Foster first knew each other as children in Hope, Arkansas; Mrs. Clinton and Mr. Foster were long-time colleagues at the Rose Law Firm in Little Rock.

second floor of the White House's West Wing where White House Counsel Bernard Nussbaum and Mr. Foster had offices. Three assistants (Mr. Nussbaum's assistants Betsy Pond and Linda Tripp and Mr. Foster's assistant Deborah Gorham) and an intern (Thomas Castleton) had desks in the outer office of the suite.

According to the testimony of a number of witnesses, Mr. Foster attended the morning Rose Garden ceremony announcing the nomination of Louis J. Freeh to be Director of the FBI. According to Ms. Tripp and Ms. Pond, at about 12:00 or 12:30 p.m., Mr. Foster asked them for lunch from the White House mess.[26]

After eating lunch in his office, Mr. Foster left the Counsel's suite. He was seen leaving by Ms. Tripp, Ms. Pond, and Mr. Castleton.[27] The OIC, like the other investigative bodies before us, has not learned of or

[26] USPP Report, 7/22/93, at 1 (Pond interview); Tripp 302, 4/12/94, at 4.

As used in citations herein, the term "OIC" refers to a transcript of either an interview or a grand jury appearance by a witness. The term "302" is the traditional term used to refer to FBI interview reports and refers here to interview reports of investigators assigned to Mr. Fiske's Office or the OIC. For reports of interviews, the dates listed are those on which the interviews took place.

[27] When he left, Mr. Foster reportedly said something to the effect that there were M&M's in his office and "So long" or "I'll be back." *See* USPP Report, 7/22/93, at 1 (Castleton interview); Castleton 302, 5/3/94, at 2; USPP Report, 7/22/93, at 1 (Pond interview). As will be fully discussed below, Ms. Tripp and Ms. Pond said that Mr. Foster was not carrying a briefcase when he left the suite. Mr. Castleton stated that Mr. Foster was carrying a briefcase when he left.

located anyone who definitively[28] saw Mr. Foster from the time he left the White House until near 6:00 p.m., at which time a private citizen found Mr. Foster dead in Fort Marcy Park.

B. Fort Marcy

Fort Marcy was constructed as a Civil War earthwork fortification. It is located between the George Washington Memorial Parkway (GW Parkway) and Chain Bridge Road in the Virginia suburbs of Washington, D.C., approximately 6.5 miles by car from downtown Washington. The GW Parkway, on which there is virtually constant automobile traffic, runs along the Virginia side of the Potomac River from Mount Vernon to the Capital Beltway. Several bridges connect the Parkway (or roads leading to the Parkway) to Washington. A parking lot for the park is adjacent to the outbound side of the GW Parkway.[29] Inside the park, as of July 1993, were two cannons—one closer to the GW Parkway and a second (the one near which Mr. Foster was found) closer to Chain Bridge Road. That

[28] The one possible exception is a citizen who observed a car entering Fort Marcy in the mid-afternoon. His statements are described below.

[29] A pedestrian can enter Fort Marcy Park from Chain Bridge Road, but a chain-link fence prevents vehicle entry and did so in July 1993, according to information provided by the Park Service. OIC Doc. No. DC-229-1. Moreover, trees and thick vines are growing through the fence in a manner that reveals that the fence has been there for some years. OIC Investigators' Memorandum, 3/1/96, at 72.

second cannon is approximately 200 yards from the parking area.[30]

Thirty-one witnesses, 19 of whom observed Mr. Foster's body, have provided relevant testimony about their activities and observations in and around the Fort Marcy Park area on July 20, 1993. They include:

> 6 private citizens (one of whom discovered and observed Mr. Foster's body);[31]
>
> 13 Park Police personnel (9 of whom observed Mr. Foster's body);
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> 11 Fairfax County Fire and Rescue Department (FCFRD) personnel (8 of whom observed the body); and
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> Dr. Haut, the doctor representing the Medical Examiner's Office who responded to the scene and examined the body.

Between about 2:45 and 3:05 p.m., a citizen (C1) driving outbound on GW Parkway saw "a dark metallic grey, Japanese sedan" occupied by a single, white male abruptly enter Fort Marcy Park.[32] C1 said in his initial 1993 statement to the Park Police that the license plate was from Ohio or Arkansas.[33] Months later, on April 18, 1994, during Mr. Fiske's investigation, C1 was shown

[30] The trees, brush, and hills within the park were such that one would not walk in an absolutely straight line from the parking lot to the second cannon.

[31] For privacy reasons, the names of the private citizens will not be included in this report.

[32] USPP Report, 7/26/93 and 8/2/93, at 1 (C1 interviews). Mr. Foster's car was a gray Honda Accord, 4-door, with Arkansas license plates.

[33] *Id.*

photographs of Mr. Foster's car. C1 stated that the car in the photographs looked "similar" to the car he recalled, but that the license plate on it differed from that which he recalled.[34]

Another citizen (C2) drove his rental car into the Fort Marcy parking lot at approximately 4:30 p.m. While there, C2 saw one unoccupied car, which he described as a "rust brown colored car with Arkansas license plates."[35] C2 also saw another nearby car; that car was occupied by a man who exited his car as C2 exited his own car.[36] C2 described this man as having "a look like he had a—an agenda," although "everything I based my observation of this guy, was from my gut, more than anything else."[37] C2 and the man did not speak to one another.[38] C2 went into the park to urinate, and the other man had reentered his car by the time C2 returned to the parking lot.[39] C2 then left the park in his car.[40]

A man (C3) and woman (C4) pulled into the Fort Marcy parking area in C4's white Nissan at about 5:00 p.m. and were still at Fort Marcy when police and rescue personnel arrived shortly after 6:00 p.m.[41] While C3 and C4 were at Fort Marcy, another citizen (C5) drove his white van into the parking lot to urinate. C5 said that he exited his van, and while walking through

[34] 302, 4/18/94, at 2.

[35] OIC, 11/1/95, at 22, 28.

[36] *Id.* at 25.

[37] *Id.* at 27, 62.

[38] *Id.* at 61-62.

[39] *Id.* at 38.

[40] *Id.* at 61-62.

[41] USPP Report, 7/20/93, at 1 (C3 and C4 interviews).

the park, found Mr. Foster's body near the second cannon, the cannon closer to Chain Bridge Road.[42] C5 then left Fort Marcy and drove approximately 2.75 miles further outbound on the GW Parkway to a parking area near GW Parkway Headquarters; there, C5 reported the dead body to two off-duty Park Service employees who called 911.[43] Numerous Park Police and FCFRD personnel then responded to Fort Marcy Park.[44]

In the initial response, two groups of FCFRD personnel, as well as Park Police Officer Kevin Fornshill, arrived at Fort Marcy Park at approximately the same time—about 6:10 p.m.[45] They then split into teams to

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[42] OIC, 2/23/95, at 11, 22-33. The Fiske Report referred to this man as CW.

C5, among other observations, said that certain vegetation in the area appeared trampled, *id.* at 28-29, although no one else reported such an observation, *see, e.g.*, Fornshill 302, 4/29/94, at 4.

[43] C5 OIC, 2/23/95, at 39, 41-43. Records show that the 911 call was placed from a phone at that parking area. Investigators' 302, 4/29/94, at 1.

[44] In the meantime, a woman (C6) had left her broken-down blue Mercedes, with hazard lights flashing, on the entrance road leading to the Fort Marcy parking area. She walked along GW Parkway to a nearby exit to obtain assistance (as there was no phone at Fort Marcy Park). C6 302, 4/11/94, at 1-2.

[45] Fairfax County records reflect that 911 was first called at 5:59:59 p.m. The Park Police dispatcher was notified at 6:02:35 p.m. The first FCFRD personnel (Pisani, Iacone, and Wacha in Engine 1) arrived at Fort Marcy Park at 6:09:58 p.m. and the second group (Gonzalez, Hall, and Arthur in Medic 1) arrived at 6:10:16 p.m. Officer Fornshill of the Park Police arrived at 6:11:50 p.m., according to Park Police records. Fairfax County records show that the FCFRD personnel indicated at 6:37 p.m. that they were available on radio, which means that they had completed their duties,

search the park. Officer Fornshill and FCFRD personnel George Gonzalez and Todd Hall composed one group; FCFRD personnel Richard Arthur, James Iacone, Jennifer Wacha, and Ralph Pisani formed the other. The Fornshill-Hall-Gonzalez group first reached the body of Mr. Foster, and the other group joined them soon thereafter.

Twelve additional Park Police personnel subsequently arrived at Fort Marcy Park. Officer Franz Ferstl was the responding beat officer and, as such, was responsible for preparing the incident report. He responded to the scene at the same time as Officer Julie Spetz. Sergeant Robert Edwards, the District supervisor, also arrived on the scene. Ferstl, Spetz, and Edwards arrived before approximately 6:15 p.m., according to the report of Officer Christine Hodakievic, who arrived at approximately 6:15 p.m. and recorded the names of those officers already on the scene (Fornshill, Ferstl, Spetz, and Edwards). Lieutenant Patrick Gavin arrived in a supervisory role at roughly 6:30 p.m., according to his recollection.

According to their reports, Investigators Cheryl Braun and John Rolla, the lead Park Police investigators, arrived along with Investigator Renee Abt at about 6:35 p.m. They received investigative assistance from Officer Hodakievic, who was an investigator in training at that time. Peter Simonello, the Park Police identification technician responsible for gathering physical evidence, arrived shortly thereafter.[46]

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although it does not mean they necessarily had departed Fort Marcy Park at that time. Arthur OIC, 1/5/95, at 72-76.

[46] Officer William Watson and an intern later came to provide any needed assistance, as did Lieutenant Ronald Schmidt.

At the scene, Park Police investigators and the Park Police identification technician conducted interviews, examined the body and Mr. Foster's car, made notes, took photographs, and collected evidence. Later, five of the Park Police personnel prepared typed reports: the responding beat officer (Ferstl), the two lead investigators (Rolla and Braun), Officer Hodakievic, and the identification technician (Simonello). Several evidence receipts were prepared to record physical evidence obtained at the scene.

When the Park Police and rescue personnel found Mr. Foster's body, he was lying on his back on a berm in front of the second cannon, the cannon nearer Chain Bridge Road.[47] He was dead and had a gun in his right

[47] *See* FCFRD Report (Gonzalez) at 1-2 ("We came across the first cannon. I searched around this area and found nothing. We searched further to the next cannon and found a dead male [with] suit pants and dress shirt."); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that he located the body just north of the second cannon"); USPP Report (Rolla) at 1 ("decedent was located . . . at the second cannon"); *see also* C5 302, 4/14/94, at 3 (referring to body's location at second cannon); Arthur OIC, 1/5/95, at 40 (same); Braun 302, 4/28/94, at 2 (same); Fornshill Senate Deposition, 7/12/94, at 15-16 (same); Gavin OIC, 2/23/95, at 12 (same; "last cannon"); Hall OIC, 1/5/95, at 18-19 (same); Hodakievic 302, 5/2/94, at 1 (same); Simonello 302, 4/28/94, at 1 (same); Wacha OIC, 1/10/95, at 32 (same). Walk-throughs conducted at the scene by investigative personnel with the witnesses confirmed this location within the park. In addition, two reporters and Park Police officers separately visited the scene on July 21 and 22, 1993, and identified the spot where the body had been located by the blood in the ground near the second cannon. Reporter 302, 4/18/96, at 1; Hill 302, 3/1/95, at 3.

Two botanists from the Department of Agriculture examined both the scene and the photographs that had been taken at the scene on July 20. They said that the plants depicted in the photographs were consistent with those observed during their examination of the second cannon area. 302, 6/2/95, at 1.

hand[48] (with his thumb trapped in the trigger guard). Gunshot residue-like material was observed on his right hand.[49] When the Park Police lifted and turned over the body later that evening, they noted a wound out the back of his head,[50] and blood on the ground underneath

[48] Both Hall and Gonzalez observed the gun in the right hand. *See* Hall OIC, 1/5/95, at 30-31; Hall Senate Deposition, 7/20/94, at 10; Gonzalez 302, 4/27/94, at 3; Gonzalez 302, 5/15/96, at 2. According to Officer Fornshill, as Hall was examining the body, Hall said words to the effect that "we've got a gun here" and pointed in the general direction of the decedent's right hand. Fornshill 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 93, 114. Fornshill did not see the gun, however. 302, 4/29/94, at 3; OIC, 1/11/95, at 114. He said that he could not see the gun either because of his position or the vegetation around the hand. 302, 4/29/94, at 3; Senate Deposition, 7/12/94, at 21; OIC, 1/11/95, at 79. As to why he did not move into a position to confirm the existence of the gun, Fornshill said, "I'm not the investigator. I let the investigator do that. I'm maintaining the scene. If there's a gun at the scene, I'm making sure nobody touches the gun, I'm making sure nobody disturbs the gun. . . . If the EMT [emergency medical technician] tells me there's a gun there then I'll go with that." OIC, 1/11/95, at 115.

C5, when he earlier observed the body, did not see a gun in Mr. Foster's hand. 302, 4/14/94, at 4. The issue raised by C5's statement is discussed further below.

Mr. Foster was right-handed. *See, e.g.*, Beryl Anthony 302, 4/11/95, at 1; Sheila Anthony 302, 4/11/95, at 1; Lisa Foster 302, 4/7/95, at 1; Foster Younger Son 302, 4/7/95, at 3; Foster Older Son 302, 4/7/95, at 5; Foster Daughter 302, 4/7/95, at 4.

[49] *See* Rolla 302, 2/7/95, at 3; USPP Report (Simonello) at 1. The residue is apparent in Polaroid photographs taken at the scene.

[50] Rolla OIC, 2/9/95, at 28-29; Hodakievic OIC, 2/14/95, at 15.

his head and back.[51] They observed no signs of a struggle.[52]

Park Police also found a gray, 4-door Honda Accord with Arkansas plates in the parking lot; that car, the police discovered later that evening, was registered to Mr. Foster.[53] The two lead Park Police investigators (Braun and Rolla) photographed and examined the car and, during that examination, found Mr. Foster's White House identification.[54] The car was towed to a Park Police impoundment lot that night.[55] The next day, the car was further photographed and examined at the impoundment lot.[56]

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[51] This issue will be discussed further below.

[52] Fornshill 302, 4/29/94, at 4; Ferstl 302, 5/2/94, at 2; Rolla Senate Deposition, 7/21/94, at 99; Simonello 302, 2/7/95, at 3.

[53] USPP Report (Rolla) at 1.

[54] *See* USPP Report (Braun) at 2; Braun 302, 4/28/94, at 3; USPP Report (Rolla) at 2. Lieutenant Gavin said he was notified by the investigators at about 8:00 p.m. that the decedent was a White House employee. Gavin OIC, 2/23/95, at 24. Gavin subsequently notified an officer of the Uniformed Division of the Secret Service, Lieutenant Woltz. *Id.* at 25. To Lieutenant Gavin's knowledge, he was the first person to notify anyone at the White House or the Secret Service about Mr. Foster's death. *Id.* at 26-27. According to a Secret Service memorandum prepared at 10:01 p.m. on July 20, the Secret Service was notified of Mr. Foster's death at 8:30 p.m. when Lieutenant Woltz was contacted by Lieutenant Gavin. OIC Doc. No. DC- 211-147.

[55] Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[56] USPP Report (Smith) at 1. Photographs were taken at the impound lot of the interior of the trunk of the car. Those photographs show stray papers, moccasin-type shoes, a book, cassette tapes, and the like (no evidence that a body had been in the trunk).

Dr. Haut, the medical examiner's representative, arrived at Fort Marcy Park at approximately 7:40 p.m. on July 20 and confirmed the death.[57] The body was then transported by FCFRD ambulance personnel to a morgue at Fairfax Hospital in Fairfax, Virginia.[58]

The witnesses' recollections of precise details at Fort Marcy Park vary in some respects (the differences will be explored below). Nonetheless, the evidence from the scene—including the gun, the apparent residue, the nature of the wound, the blood, the lack of any signs of a struggle—points to the conclusion that death resulted from suicide by gunshot. A final determination of the

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[57] Officer Hodakievic's report and Technician Simonello's report indicate that Dr. Haut arrived at 7:40 p.m. USPP Report (Hodakievic) at 1; USPP Report (Simonello) at 1. Investigator Abt's contemporaneous notes place Dr. Haut's arrival at 7:43 p.m. Although Dr. Haut subsequently recalled arriving at an earlier time, *see* 302, 4/14/94, at 1 (6:45 p.m.); OIC, 2/16/95, at 8 (7:15 p.m.), Dr. Haut did not contemporaneously record the time of his arrival. The several contemporaneously prepared notes and reports of the Park Police officers therefore are likely more accurate.

Dr. Haut completed a "Report of Investigation by Medical Examiner" after the incident; the report is stamped with the date July 30, 1993. OIC Doc. No. DC-106A-1 to DC-106A-2. The report states that the cause of death was "perforating gunshot wound mouth-head" and the means of death was "38 caliber handgun." *Id.* It states that the manner of death was "suicide." *Id.* Dr. Haut signed the death certificate. It states that the cause of death was "perforating gunshot wound mouth-head" and that the manner of death was "suicide" by "self-inflicted gunshot wound mouth to head."

[58] The body arrived at the hospital at approximately 8:30 p.m., according to logs of the FCFRD. Hospital and morgue logs show that Dr. Julian Orenstein viewed the body at the hospital in the ambulance at 8:49 p.m., and that the body was received at the morgue at 9:00 p.m., OIC Doc. Nos. DC-108-12 to DC-108-16.

manner of death depends on a variety of further investigative steps—most importantly, those associated with forensic science.

V. FORENSIC ANALYSES

The forensic analyses, in conjunction with the evidence from the scene, confirm that Mr. Foster committed suicide in Fort Marcy Park.

A. Autopsy

The autopsy occurred on July 21, 1993, in the presence of six persons. Dr. James Beyer, Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner, conducted the autopsy, aided by an assistant. Park Police Sergeant Robert Rule and Officer James Morrissette observed the autopsy.[59] Park Police Identification Technicians Hill and Johnson took photographs at the autopsy and collected evidence such as clothing, blood samples, and hair samples. Dr. Beyer prepared an autopsy report. He has supplemented the report with testimony on several occasions.

Dr. Beyer has performed over 20,000 autopsies.[60] His responsibility is to determine cause of death and, in the case of a gunshot wound, to determine with the police the manner of death—suicide, homicide, accident, or undetermined.[61]

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[59] Officer Morrissette's report on the autopsy states: "After briefing him with the available information surrounding the crime scene and the victim he started the autopsy on the victim." USPP Report (Morrissette) at 1.

[60] Beyer OIC, 2/16/95, at 4.

[61] *Id.* at 5.

Dr. Beyer said Dr. Haut contacted him early on July 21, 1993, to advise him of Mr. Foster's death.[62] Dr. Beyer recalled that Dr. Haut indicated that there was a perforating gunshot wound (that is, a gunshot wound with an entrance and exit) and that the Park Police was the investigating agency.[63]

Dr. Beyer recalled that when he opened the body bag, there was blood on the right side of the face and on the right shoulder area of the shirt.[64] Dr. Beyer found a large amount of blood in the body bag.[65]

The autopsy report states that Mr. Foster's height was 6 feet and 4 1/2 inches and his weight was 197 pounds. The report indicates no problems or abnormalities with the cardiovascular system, respiratory system, liver, gall bladder, spleen, pancreas, adrenal and thyroid glands, gastrointestinal tract, genitourinary tract, kidneys, urinary bladder, or genitalia. The report states that the "[s]tomach contains a considerable amount of digested food material whose components cannot be identified."[66]

As to the head, the report indicates:

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[62] *Id.* at 8.

[63] *Id.* at 9. Dr. Beyer had no conversations with members of the White House, the Foster family, or Foster family attorneys in connection with the autopsy. *Id.* at 6.

[64] *Id.* at 10-11.

[65] Lee Report at 495.

[66] Officer Morrissette's report also indicates that Dr. Beyer stated at the autopsy "that it appeared that the victim had eaten a 'large' meal which he [Dr. Beyer] believed to have occurred within 2-3 hours prior to death." USPP Report (Morrissette) at 1. An exact time of death has not been established.

> Perforating gunshot wound mouth-head; entrance wound is in the posterior oropharynx at a point approximately 7 1/2" from the top of the head; there is also a defect in the tissues of the soft palate and some of these fragments contain probable powder debris. The wound track in the head continues backward and upward with an entrance wound just left of the foramen magnum with tissue damage to the brain stem and left cerebral hemisphere with an irregular exit scalp and skull defect near the midline in the occipital region. No metallic fragments recovered.

The report contains a diagram of the head and brain area that depicts the entrance wound and the fracture line. A separate diagram depicts the fracture lines, exit, and skull damage. A third page of diagrams of the head area states "perforating gunshot wound" and describes the entrance wound as follows: "Entrance—mouth—posterior oropharynx—large defect—soft palate defect / powder debris identified." It describes the exit wound as a wound of 1 1/4" x 1". The report indicates "backward" and "upward" as the direction of the bullet through the head.[67]

With respect to the wound, Dr. Beyer stated: "The entrance wound was in the back of the mouth, what we call the posterior oropharynx, where a large defect was present. There was also a soft palate tissue defect, and powder debris could be identified in the area of the soft palate and the back of the mouth. The exit wound is depicted [in the autopsy report] as being present three

[67] Officer Morrissette's report similarly indicates that "[t]he cause of death was determined to be 'perforated gunshot wound in and out.' The point of entry was in the back of the mouth with the exit in the back of the head." *Id.*

inches from the top of the head, approximately in the midline, and there is an irregular wound measuring one and one-quarter inch by one inch."[68] There was "good alignment" between the entrance and exit wounds, and there was "no reason to think that this was not an entrance and exit defect configuration."[69] As the report indicates, Dr. Beyer did not recover any bullets or bullet fragments from the body.[70]

The report states that "[s]ections of soft palate" were "positive for powder debris," and Dr. Beyer said that the gunpowder debris in the mouth was "grossly present," meaning that it could be seen with the naked

[68] OIC, 2/16/95, at 19.

[69] *Id.* at 20.

[70] *Id.* at 16. The lack of a bullet or bullet fragments was confirmed by others who attended the autopsy. Dr. Beyer's assistant recalled that Dr. Beyer inserted a probe through the path of the bullet before the skull was opened and commented that the path was clear. (Autopsy photographs clearly depict the wound and the probe through the wound path.) The assistant recalled that after the brain was removed and visually inspected, Dr. Beyer dissected it with cuts of approximately one-eighth inch thickness, and that no bullet fragments were located in the brain. 302, 9/11/95, at 2-3. According to Officer Morrissette's report, Dr. Beyer stated "that the bullet trajectory was 'upward and backward' exiting in the center line of the back of the head" and that "there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. Officer Johnson recalled the examination of the wound path and said that no projectile or bullet fragment was recovered. Johnson recalled that Dr. Beyer may have mentioned that it was a clean wound, meaning that it was a through-and-through shot. 302, 2/2/95, at 2. Sergeant Rule similarly recalled being present when the skull was opened and the wound track examined; no projectile or fragments were recovered. 302, 2/3/95, at 2. Technician Hill recalled that a trajectory rod was inserted in the wound track and that no bullet or bullet fragment was recovered. 302, 3/1/95, at 1-2.

eye, and was present in a "large amount."[71] Thus, Dr. Beyer stated that "the obvious finding was that the muzzle of the weapon had to be in his mouth, close to the back of his throat, back of his mouth."[72]

Dr. Beyer said that he performed "an external examination of the body, with photography of the body. We then examine the body for any identifying marks, such as scars, tatoos or wounds."[73] Dr. Beyer stated that he recalls observing powder debris on the right hand.[74] He recalled gunpowder debris on the left hand to a much lesser degree.[75] (The diagrams in the autopsy report indicate "black material" on both the right hand and the left hand.) Dr. Beyer also recalled a "tanish brownish indentation" across the back of the right thumb (the thumb which had been in the trigger guard).[76]

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[71] OIC, 2/16/95, at 20, 22.

[72] *Id.* at 22.

[73] *Id.* at 12.

[74] *Id.* at 16. Officer Morrissette's report states that Dr. Beyer "pointed out what he thought to be gunpowder residue on the right hand forefinger of the victim. I supplied him with a picture of the crime scene in which the suspected residue was evident." USPP Report (Morrissette) at 1. Officer Johnson also recalled black marks on the right hand. 302, 2/2/95, at 2. Technician Hill recalled apparent gunshot residue on Mr. Foster's hand. 302, 3/1/95, at 2. Sergeant Rule recalled apparent gunshot residue on Mr. Foster's right hand. 302, 2/3/95, at 2.

[75] OIC, 2/16/95, at 16.

[76] *Id.* Semen was found on Mr. Foster's shorts by the FBI Laboratory. FBI Lab Report, 5/9/94, at 10. Involuntary urination and secretion of seminal fluid often occur upon death. Berman Report at 15; Hirsch OIC, 2/16/95, at 46; Beyer OIC, 2/16/95, at 15; OIC Memorandum (Blackbourne).

Dr. Beyer said that observation of Mr. Foster's body revealed no wounds on the neck, hands, buttocks, shoulder, back, or any portion of the body other than the head; he said, moreover, that any such wounds would have been registered on the anatomic diagram.[77]

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[77] OIC, 2/16/95, at 12-13. The lack of other wounds was confirmed by others at the autopsy. Dr. Beyer's assistant, for example, said he did not see any other wounds on Mr. Foster's body. 302, 9/11/95, at 3. Officer Johnson stated that he did not observe any trauma or other marks on the body other than the gunshot wound to the mouth and skull. 302, 2/2/95, at 2. Sergeant Rule stated that he did not observe or hear mention of any trauma to Mr. Foster other than the bullet wound to the mouth and skull. 302, 2/3/95, at 2. Technician Hill recalled the damage to the rear of the skull as the only trauma she observed. 302, 3/1/95, at 2. Officer Morrissette stated that he relied on Dr. Beyer's observations and descriptions at the autopsy and that he recalled neither Dr. Beyer nor anyone else making any mention of other wounds or trauma. 302, 2/10/95, at 3. An interview report of George Gonzalez, one of the FCFRD personnel on the scene at Fort Marcy Park, stated that Gonzalez believed he had seen a wound in the upper-right-front portion of the skull. 302, 2/23/94, at 2. In another interview, Gonzalez stated that that report does not reflect "what [he] recalls or what he intended to report." 302, 5/15/96, at 3. Another of the FCFRD personnel, Richard Arthur, initially said he saw what "appeared to be a bullet wound, an entrance wound" on the neck. OIC, 1/5/95, at 63. After examining autopsy photos, which he said were taken from a better angle and a better view, he said he may have been mistaken about such a wound. 302, 4/24/96, at 1.

The initial statements of Gonzalez and Arthur were explored during the Senate's inquiry into Mr. Foster's death, the probe by Mr. Clinger, and the Fiske investigation. Those investigations included examination of the scene and autopsy photographs and found that the only wound to Mr. Foster was the gunshot wound through the back of his mouth and out the back of his head. *See, e.g.*, Fiske Report at 33 n.* ("The autopsy results, the photographs taken at the scene, and the observations made by Park Police investigators conclusively show that there were no such wounds"

Dr. Beyer stated that "[t]here was no evidence of any trauma to the individual other than the gunshot wound."[78]

Dr. Beyer concluded that this was a self-inflicted wound[79] based upon the fact that there was no evidence of any trauma other than the gunshot wound, and "no evidence of any central nervous system depression or diseased state that would have permitted, in my estimation, somebody to walk up and put a gun in his mouth and pull the trigger."[80]

Dr. Beyer's conclusions were reviewed by two sets of experts, one set retained by the OIC and the other by Mr. Fiske's office. Their analyses of Dr. Beyer's findings and of the relevant laboratory analyses are outlined below. They confirm the conclusions reached at the autopsy.

B. <u>Laboratory Analyses</u>

A number of photographs were taken at Fort Marcy Park and at the autopsy.[81] In addition, at both the scene and the autopsy, the Park Police obtained physical evidence. Evidence receipts show that, at the Fort Marcy scene, the Park Police obtained physical evidence and clothing, including the following:

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as those recalled by Gonzalez and Arthur.). OIC experts and investigators carefully reviewed the evidence and reached that same conclusion, as will be discussed further below.

[78] OIC, 2/16/95, at 26.

[79] *Id.* at 23.

[80] *Id.* at 26.

[81] The issue of photographs taken at Fort Marcy is discussed further below.

* Colt Army Special .38 caliber revolver, 4", 6-shot (obtained from "right hand victim")
* round .38 caliber RP 38 SPL HV
  (from "revolver")
* casing .38 caliber RP 38 SPL HV
  (from "revolver")
* eyeglasses
  (from "bottom of berm")
* Seiko quartz wrist watch
  (from "Deceased left wrist")
* pager
  (from "Deceased right side waist area")
* silver colored ring
  (from "Deceased right ring finger")
* gold colored band type ring
  (from "Deceased left ring finger")
* black suit jacket
  (from "front passenger seat of gray Honda")
* blue silk tie with swans
  (on "top of coat on front passenger seat")
* White House Identification
  (from "under coat on front passenger seat")
* brown leather wallet
  (from "inside suit jacket pocket of suit jacket from front passenger seat")

At the autopsy, the Park Police obtained physical evidence and clothing, including the following:

* one vial of blood
* lock seal envelope containing pulled head hairs
* white colored long sleeve button down shirt with blood stain
* white colored short sleeve t-shirt with blood stain
* pair white colored boxer shorts
* pair blue gray colored pants with black colored belt
* pair black colored socks
* pair black colored dress shoes, size 11M

The Park Police and Medical Examiner's Office caused several laboratory tests of the evidence to be performed during the initial 1993 investigation. In addition, Mr. Fiske's office and the OIC submitted physical evidence collected during the investigation of Mr. Foster's death to the FBI Laboratory, which has produced reports analyzing physical evidence. The OIC also submitted physical evidence to Dr. Lee, and he, too, produced a report based on his laboratory analyses. The following summarizes the relevant laboratory analyses.

1. Gun

a. Operation

The .38 caliber revolver recovered from Mr. Foster's hand at Fort Marcy Park had a four-inch barrel and a capacity of six shots.[82] It had one live round and one

[82] USPP Evidence/Property Control Receipt (Simonello) at 1.

spent casing.[83] Had the trigger been pulled again, the next shot would have fired the remaining round.[84]

In August 1993, at the request of the Park Police, the Bureau of Alcohol, Tobacco and Firearms (ATF) Laboratory examined the revolver and found that it functioned. The ATF Laboratory determined that the cartridge case found in the cylinder under the hammer was fired in that gun.[85] The FBI Laboratory also test-fired the gun and determined that it "functioned normally" and that the trigger pulls were normal.[86] The .38 caliber cartridge case "was identified as having been fired in the . . . revolver."[87] Like the expended cartridge, the unexpended cartridge was .38 caliber manufactured by Remington. They bore similar headstamps.[88] Dr. Lee also test-fired the revolver and found that it was operable.[89]

b. Serial Numbers

An ATF report on the gun's two serial numbers revealed a purchase at the Seattle Hardware Company in Seattle, Washington, on September 14, 1913, and at the Gus Habich Company in Indianapolis, Indiana, on December 29, 1913.[90] The gun could not be further traced.[91] Laboratory examination of the gun

[83] *Id.*

[84] OIC Investigators' Memorandum, 6/22/95, at 2.

[85] ATF Lab Report, 8/17/93, at 1.

[86] FBI Lab Report, 5/9/94, at 6.

[87] *Id.*

[88] *Id.*

[89] Lee Report at 451-54.

[90] ATF Report of Firearms Tracing, National Tracing Center.

[91] *Id.*

found no indication of any alteration of the serial number of the weapon. . . . The additional serial number on the crane of the firearm most likely occurred at some time when the eighty year-old weapon was repaired. There is no realistic way to determine when such a repair occurred. The exchange of the two numbers between the frame and the crane is a condition noted on many similar firearms in the Laboratory's Reference Firearms Collection and is not considered significant.[92]

c. **Ammunition**

Dr. Lee noted that the ammunition found in this weapon was type "RP .38 SPL HV," manufactured by Remington Peters. Dr. Lee stated that information from the manufacturer indicated that this ammunition was discontinued in 1975, and that the cartridge therefore would have been manufactured prior to that time.[93]

d. **DNA**

DNA consistent with Mr. Foster's DNA was detected on the muzzle portion of the barrel of the revolver. In particular, DNA type DQ alpha 2, 4 was detected on the gun and in Mr. Foster's blood.[94]

e. **Blood**

The gun was recovered at the scene by Park Police Technician Simonello and subsequently packaged in

[92] FBI Lab Report, 6/21/94, at 1.

[93] Lee Report at 488-89. That finding is consistent with the fact that, as is explained below, the gun at one time likely was located in the home of Mr. Foster's parents in Hope, Arkansas.

[94] FBI Lab Report, 5/9/94, at 10.

brown paper for storage in an evidence locker.[95] While the Park Police's subsequent examinations for fingerprints and other evidence could have removed some trace evidence that might have existed on the gun, Dr. Lee examined the gun and reported that "[s]mall specks of brownish-colored deposits were noted."[96] Dr. Lee found that "[s]ome of these deposits gave positive results with a chemical test for blood" although the "quantity of sample present was insufficient for further analysis."[97]

Dr. Lee also reported that "[m]acroscopic and microscopic examination of [the] piece of paper" originally wrapped around the barrel of the revolver for evidence storage "revealed the presence of reddish-colored particles. These stains also gave positive results with a chemical test for blood."[98] Dr. Lee stated that "[t]his fact suggests that the barrel of the weapon was in contact or at close range to a source of liquid blood."[99] Dr. Lee further stated that "[b]lood spatters and tissue-like materials were noted on the fingerprint lift tape from the weapon."[100] He reported that "[c]hemical tests for blood were positive with some of these materials."[101] Dr. Lee concluded that "[t]he presence of blood and tissue-like materials on the lifts is another strong

[95] USPP Report (Simonello) at 1 ("I then wrapped the barrel in brown paper"); USPP Report (Smith) at 1.

[96] Lee Report at 286.

[97] *Id.*

[98] *Id.* at 488.

[99] *Id.*

[100] *Id.*

[101] *Id.*

indication that this weapon was fired while in contact with or close to a blood source."[102]

f. Fingerprints

Identification Technician E.J. Smith of the Park Police examined the gun for latent fingerprints[103] on July 23, 1993. The results were negative.[104] The FBI Laboratory later examined the gun and similarly detected no latent prints on the exterior surface of the weapon.[105]

In his report to the OIC, Dr. Lee explained that "[t]he handle grip area of [the .38 Colt revolver] is textured and is not typical of the type of surface which commonly results in the development of identifiable latent fingerprints."[106] He also noted that the fingerprint powder method was used when the Park Police initially tested the gun; "[a]lthough the fingerprint powder method is one of the most common techniques used in the latent print field, there are also newer technologies, such as cyanoacrylate fuming, laser, and forensic lighting techniques which could have been used in this case. It is unknown at this time whether these

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[102] *Id.*

[103] Fingerprint examiners can perform fingerprint identifications when they obtain a sufficient number of ridge details to allow an identification. *See generally Physical Evidence* at 171 (Lee ed.).

[104] USPP Report (Smith) at 1. Identification Technician Simonello noted in his report of July 29, 1993, that "[o]n Sunday July 25, 1993, I was advised by Tech. S. Hill that item #1 had been processed for latent prints by Tech. E.J. Smith and that the results were negative." USPP Report (Simonello) at 1.

[105] FBI Lab Report, 6/9/94, at 2.

[106] Lee Report at 487.

techniques would have provided additional information" had they initially been employed.[107]

The FBI Laboratory also noted that a lack of fingerprints is not extraordinary and that "[g]enerally, the determining factors in leaving latent prints are having a transferable substance, i.e., sweat, sebaceous oil or other substance on the fingers, and having a surface that is receptive to receiving the substance that forms the latent prints. A clean, smooth, flat surface is most receptive for transfer of any substance from the fingers,"[108] and the surface of the grip handle at issue here was textured, not smooth.

g. Marks on Body from Gunshot and Gun

(1) Gunshot Residue on Hands

The photographs of Mr. Foster's right hand taken at Fort Marcy Park and during the autopsy depict black gunshot residue-like material on the right forefinger and the area between the thumb and forefinger. The autopsy report also noted material on the forefinger area of the left hand.

During the Park Police investigation, the ATF Laboratory found that gunshot residue patterns reproduced

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[107] *Id.* at 487-88.

[108] FBI Lab Report, 6/9/94, at 2. The FBI Laboratory, during its examinations, found one latent fingerprint on the underside of the pistol grip (that is, not on an exterior surface of the gun). FBI Lab Report, 7/19/95, at 1. This print has been compared to prints of Mr. Foster and of evidence technicians who initially handled the gun, but no identifications were effected. FBI Lab Report, 12/13/95, at 1; FBI Lab Report, 8/14/95, at 1. This print would have been left by someone who assembled or disassembled the gun, for example, to repair it or to put on new grips or for some other reason.

in the laboratory were consistent with those seen in the photographs taken by the Park Police at the scene.[109] The FBI Laboratory similarly stated that gunshot residue on the right forefinger area of the right hand is "consistent with the disposition of smoke from muzzle blast or cylinder blast when the . . . revolver is fired using ammunition like that represented by" the cartridge and casing recovered from the gun "when this area of the right hand is positioned near the front of the cylinder or to the side of and near the muzzle."[110]

Dr. Lee conducted test firings using a laboratory standard weapon and the same kind of ammunition that was found in the revolver recovered from Mr. Foster's hand. With the standard weapon, little or no observable gunpowder particles were released from the cylinder area or onto the shooter's hand.[111] However, Dr. Lee reported that each test-fired shot of the revolver found in Mr. Foster's hand at Fort Marcy Park produced a significant amount of unburned and partially burned gunpowder.[112] Relatedly, Dr. Lee reported that the gun had an "extraordinary front cylinder gap"[113] (the space between the cylinder and the barrel) of .01 inch through which gunpowder residue is expelled when the gun is fired. Dr. Lee stated that the gap was one "possible cause[] of the deposit of a large amount of gunshot residue particles on Mr. Foster's body and clothing."[114]

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[109] ATF Lab Report, 8/17/93, at 1.

[110] FBI Lab Report, 5/9/94, at 7.

[111] Lee Report at 489.

[112] *Id.*

[113] *Id.* at 487.

[114] *Id.*

(2) Indentation on Thumb

The revolver was recovered from Mr. Foster's right hand at the scene at Fort Marcy Park by Park Police Technician Simonello. Technician Simonello reported that Mr. Foster's thumb was trapped in the trigger guard of the gun.[115] Consistent with Technician Simonello's observation, the autopsy photographs depict an indentation mark on the inside of the right thumb.

> The mark on the inside of the right thumb which is visible in the [autopsy] photograph is consistent with a mark produced by the trigger of the . . . revolver when this portion of the right thumb is wedged between the front of the trigger and the inside of the front of the trigger guard of the . . . revolver when the trigger rebounds (moves forward). The trigger of the . . . revolver automatically rebounds when released after firing (single or double action) or whenever the trigger is released after it is moved to the rear. This mark is consistent with the position of the right thumb of the victim in the trigger guard of the revolver in [three Polaroid] photographs.[116]

h. Summary: Gun

Dr. Lee concluded, "[b]ased on laboratory observations and the examination of the scene photographs," that "the revolver . . . is consistent with the weapon

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[115] USPP Report (Simonello) at 1 ("The right thumb was trapped between the trigger and inside front edge of the trigger guard."). Thus, Technician Simonello indicated that the revolver could not be easily removed. 302, 2/7/95, at 3.

[116] FBI Lab Report, 5/9/94, at 7.

which resulted in the death of Mr. Vincent Foster. The barrel of this weapon was likely in Mr. Foster's mouth at the time the weapon was discharged. Gunshot residue noted on Mr. Foster's right hand and the lesser amount of deposits on his left hand indicated that Mr. Foster held the weapon when it was fired."[117]

2. Clothing

At the autopsy, clothing was removed from Mr. Foster's body and placed on a table in the autopsy room.[118] Park Police Officer Johnson took this clothing and placed it in a single bag for return to the Park Police offices.[119] There, brown wrapping paper was laid on the floor of a photography room and the clothes placed on that paper.[120] The clothes were left to dry in the photography room until Monday, July 26, when Technician Simonello packaged the clothing and put it into an evidence locker.[121]

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[117] Lee Report at 488.

[118] Johnson 302, 2/2/95, at 2. As noted above, this clothing consisted of the shirt, t-shirt, pants, belt, boxer shorts, shoes, and socks.

[119] *Id.* Because the clothing was packaged together before trace evidence was collected, specific trace evidence (in particular, that which is more readily transferred) cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death. To obtain precise trace evidence analyses, each item must be kept separate before trace evidence is collected. *See Crime Scene Investigation* at 89 (Lee ed. 1994) ("The collection and preservation of physical evidence is the most important building block available to the crime scene investigator. . . . Each type of physical evidence has unique properties and must be collected and preserved carefully to avoid contamination.").

[120] *Id.* at 2-3.

[121] USPP Report (Simonello) at 1.

The FBI Laboratory and Dr. Lee independently examined the clothing, examined debris collected from the clothing by the FBI Laboratory during the 1994 investigation conducted by Mr. Fiske's Office, studied photographs taken at the scene and autopsy, and reported a number of findings related to the clothing.

a. Gunshot Residue

Dr. Lee, in his examinations, reported "[s]mall deposits of gunpowder residue and partially burned gunpowder particles" on the shirt.[122] Earlier FBI Laboratory examination of the shirt resulted in a positive reaction for vaporized lead and very fine particulate lead on the front of the shirt. "This type of reaction is consistent with the type of reaction expected when a firearm is discharged in close proximity to this portion of the shirt. It is consistent with muzzle blast or cylinder blast from a revolver like the [submitted] revolver using ammunition like" the cartridge and cartridge case submitted with the gun.[123] The FBI Laboratory further stated that

> [s]ubsequent chemical processing of the . . . shirt in the Laboratory revealed lead residues in a small area near the sixth button from the collar on the front of the . . . shirt. This reaction could have been caused by contact with a source of lead residues. Lead residues were also detected on the underside of the edge of the collar on the left side of the . . . shirt. This small area of lead residues could have been caused by the discharge of a firearm consistent with the positive reaction noted

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[122] Lee Report at 490.

[123] FBI Lab Report, 5/9/94, at 6.

above when the [submitted] shirt was received in the Laboratory.[124]

The FBI Laboratory reported that these gunshot residues "are consistent with the cylinder blast or the muzzle blast" which would be produced if the revolver was fired "in close proximity to the front of th[is] shirt."[125]

Similarly, when the ATF Laboratory, at the request of the Park Police, tested Mr. Foster's shirt, it found "a positive reaction consistent with the discharge of a revolver in close proximity to the upper front of the shirt."[126]

b. Bloodstain Patterns as Depicted in Photographs from Scene

The FBI Laboratory examined the bloodstain patterns depicted in the Polaroids taken at the scene. The Laboratory Report stated:

> Photographs of the victim at the incident scene depict apparent blood stains on his face and the right shoulder of his dress shirt. The staining on the shirt covers the top of the shoulder from the

[124] *Id.*

[125] FBI Lab Report, 6/13/94, at 2. In debris collected from the clothing, the FBI Laboratory found approximately 20 gunpowder particles that were similar to the gunpowder in the fired cartridge case of the gun found in Mr. Foster's hand, and two that were not. The Laboratory stated that one of the two dissimilar particles was "not consistent with having originated from a fired cartridge" and the other one was found "on a piece of paper used to dry Foster's clothes." *Id.* at 3. From these facts, the Laboratory stated that these two particles are "not likely associated with this investigation." *Id.*

[126] ATF Lab Report, 8/17/93, at 2.

> neck to the top of the arm and consists of saturating stains typical of having been caused by a flow of blood onto or soaking into the fabric. The stains on his face take the form of two drain tracks and one larger contact stain. . . .
>
> The contact stain on the right cheek and jaw of the victim is typical of having been caused by a blotting action, such as would happen if a blood-soaked object was brought in contact with the side of his face and taken away, leaving the observed pattern behind. The closest blood-bearing object which could have caused this staining is the right shoulder of the victim's shirt. The quantity, configuration and distribution of the blood on the shirt and the right cheek and jaw of the victim are consistent with the jaw being in contact with the shoulder of the shirt at some time.[127]

Dr. Lee also examined the photographs taken at Fort Marcy Park. He noted that the photographs of the shirt show several areas of bloodstains, including "saturated-type bloodstains" on the "shoulder and collar region."[128]

On a separate bloodstain issue, Dr. Lee examined the photographs and reported that "[h]igh velocity impact type blood spatters were observed on Mr. Foster's face, hands, and shirt."[129] Dr. Lee stated that "[t]his type of blood spatter typically is produced at the time when a weapon is discharged and the spatters result from the

[127] FBI Lab Report, 5/9/94, at 9.

[128] Lee Report at 494. The FBI Laboratory determined that blood on the shirt and t-shirt were consistent with Mr. Foster's blood type. FBI Lab Report, 5/9/94, at 10.

[129] Lee Report at 495.

backspatter of the gunshot wound."[130] Dr. Lee reported that "[t]hese blood spatters are intact and no signs of alteration or smudging were observed."[131] This finding is in conflict with any theory that the fatal shot was fired elsewhere and the head wrapped during movement or cleaned upon arrival—because those actions likely would have altered, smudged, or eliminated the blood spatters, contrary to what Dr. Lee found.[132]

c. Blood Drainage After Movement from Fort Marcy Park and Bloodstains on Clothing at Autopsy

Dr. Lee noted that Dr. Beyer had "observed a large amount of liquid blood in the body bag and in Mr. Foster's body," which "further indicates that the location where the body was found is consistent with the primary scene [and that it] is, therefore, unlikely that Mr. Foster's body was moved to the Fort Marcy Park scene from another location."[133]

The shirt itself, which was removed at the autopsy after movement of the body to the morgue, contains bloodstains on areas where blood does not appear in the photographs of the body at the scene.[134] Dr. Lee stated that these stains on the shirt "most likely occurred

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[130] *Id.*

[131] *Id.*

[132] OIC Investigators' Memorandum (Lee). In addition, Dr. Lee examined the shoes and found "[n]o heavy bloodstains or dripping type bloodstain patterns," Lee Report at 492, contrary to what might have been found had the body somehow been moved in an upright position. OIC Investigators' Memorandum (Lee).

[133] Lee Report at 495.

[134] *Id.* at 490, 494.

when the body was placed into the body bag and moved from the scene and/or when in the body bag, prior to the collection of the decedent's clothing."[135] As noted below, the experts concluded that the shirt likely would have been more extensively stained when the body was found at the second cannon area at Fort Marcy Park had the body been moved from another location.

d. Mineral/Vegetative Material

Dr. Lee reported that examination of a photograph of Mr. Foster's shoes taken by the FBI Laboratory at the time of its initial examination revealed brownish smears on the left heel.[136] Dr. Lee further stated that his own macroscopic and microscopic examinations of the shoes revealed the presence of soil-like debris.[137] (The FBI Laboratory photo of the shoes, taken in 1994 at the time of the Laboratory's examination of the clothing, shows traces of soil visible to the naked eye.) Dr. Lee found that "[t]race materials were located embedded in the grooves of the sole patterns at the heel of [the left shoe]. A portion of this

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[135] *Id.* at 490. As to the pants, which also were removed after the body was moved in the body bag to the morgue, "[m]acroscopic and microscopic examination . . . revealed the presence of bloodstains. The majority of these bloodstains were consistent with contact transfer type bloodstain patterns." *Id.* at 492. Dr. Lee reported that no bloodstains or gunpowder particles were found on the jacket. That fact, Dr. Lee stated, "indicates that Mr. Foster was not wearing the jacket or the jacket was not in close proximity to the weapon at the time the weapon was discharged." *Id.* at 490. That finding comports with the evidence: Mr. Foster was not wearing a suit jacket when he was found; rather, his jacket was recovered from his car at Fort Marcy Park. *See supra* at 35.

[136] Lee Report at 491.

[137] *Id.*

material subsequently was removed. Microscopic and macroscopic examination showed this material to contain mineral particles, including mica, other soil materials, and vegetative matter."[138] Dr. Lee stated that this fact "indicates the sole of the shoe had direct contact with a soil surface containing these materials."[139]

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[138] *Id.* at 492.

[139] *Id.* It was not possible to associate definitively any of these mica or soil materials with Fort Marcy Park. As the FBI Laboratory explained, "[t]he trace amount of loose, unconsolidated soil" like that found on Mr. Foster's shoes and in the debris from the clothing "limits the meaningfulness regarding a comparison with other soils." Therefore, these materials "could have originated from the micaceous soil found at Fort Marcy, but the nature of this soil precludes an unambiguous association." FBI Lab Report, 7/9/96, at 1.

There has been misunderstanding of the statement in an earlier FBI Lab report that no "*coherent* soil" was found in the samples. FBI Lab Report, 5/9/94, at 12 (emphasis added). The FBI Lab Report's statement regarding a lack of coherent soil simply means, as explained in the preceding paragraph, that there was insufficient soil to effect a comparison with soil samples from Fort Marcy Park. But a lack of *coherent* soil is not the same as a lack of any trace of soil. And as Dr. Lee concluded, examination of Mr. Foster's shoes revealed particles of soil materials, indicating that the sole of the shoe did in fact have direct contact with a soil surface.

Regarding the lack of mud or "coherent" soil, the weather on July 20, 1993, and throughout the month of July was hot and dry in the area surrounding Fort Marcy Park. Weather information for National Airport, a few miles from Fort Marcy Park, from the National Oceanic and Atmospheric Administration indicates that on July 20, 1993, the temperature ranged from a low of 75 degrees to a high of 96 degrees. There was no recorded precipitation. For the month of July 1993, total precipitation was 1.36 inches, which is 2.44 inches below normal. The average temperature for the month

e. <u>Lack of Rips, Tears, or Scraping on Clothing</u>

Dr. Lee found a small amount of vegetative material on Mr. Foster's shirt that could have resulted from contact with the ground in the park.[140] Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt. Dr. Lee stated that this fact "suggests that no prolonged moving contact with a soil surface occurred which would cause the type of damage commonly resulting from dragging or similar action."[141]

Dr. Lee reported that soil and grasslike materials were similarly present on the pants in the area of the rear pocket, which indicates that the pants had direct contact with a soil surface.[142] Dr. Lee reported that "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants."[143]

f. <u>Bone Chip</u>

Dr. Lee examined debris collected from Mr. Foster's clothing and reported that the debris was "found to contain a bone chip."[144] Dr. Lee stated that DNA was extracted from this bone fragment and amplified, and the DNA profile generated for this bone sample was consistent with the DNA types of Mr. Foster.[145] Based on his analysis of the evidence, Dr. Lee concluded that

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was 83.1 degrees, 3.1 degrees above normal. OIC Doc. No. DC-BI-6.

[140] Lee Report at 491.

[141] *Id.*

[142] *Id.* at 492.

[143] *Id.*

[144] *Id.* at 130, 243, 493.

[145] *Id.*

"[t]his bone chip originated from Mr. Foster and separated from his skull at the time the projectile exited Mr. Foster's head."[146]

g. Pants Pocket and Oven Mitt

William Kennedy, Associate White House Counsel, eventually took possession of Mr. Foster's car on behalf of the Foster family after the Park Police released it on July 28, 1993. Mr. Kennedy maintained contents of the car that had not been taken into evidence by the Park Police, and he produced those contents to investigators from Mr. Fiske's Office.[147] The contents included a kitchen oven mitt that had been in the glove compartment in Mr. Foster's car (the mitt is depicted in the glove compartment in the Park Police photographs of the car taken at the impoundment lot on July 21).[148]

Dr. Lee's examinations of this oven mitt and of Mr. Foster's pants (taken into evidence by the Park Police at the autopsy on July 21) produced circumstantial evidence relevant to the investigation.

Dr. Lee reported that "[m]acroscopic and microscopic examination of the inside of the front pants pockets revealed the presence of fibers and other materials, including a portion of a sunflower seed husk in the front left pocket. Instrumental analysis of particles removed from the pocket surface revealed the presence of lead. These materials were also found inside the oven mitt located in the glove compartment of Mr. Foster's ve-

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[146] *Id.*

[147] Kennedy 302, 5/6/94, at 11-12; Attorney 302, 6/16/94, at 1.

[148] Investigators Rolla and Braun also recalled the oven mitt in the glove compartment of the car on July 20. Braun OIC, 2/9/95, at 95-96; Rolla 302, 4/17/96, at 6.

hicle. . . . The presence of these trace materials could indicate that they share a common origin. These materials in the pants pocket clearly resulted from the transfer by an intermediate object, such as the Colt weapon."[149]

As noted, Dr. Lee also examined the oven mitt recovered from Mr. Foster's car. He reported: "Dark particle residues were located inside of the oven mitt. Instrumental analysis revealed the presence of the elements lead and antimony in these particles; this finding could indicate that an item which had gunshot residue on it, such as the revolver . . ., came in contact with the interior of [the oven mitt]."[150]

Dr. Lee further stated that "[s]unflower-type seed husks were located on the inner surfaces of this oven mitt. These sunflower seed particles were similar to the sunflower seed husks found in Mr. Foster's front, left pants pocket."[151] Dr. Lee stated that "[t]his finding suggests that the sunflower seed husk found inside the pants pocket could have been transferred from the oven mitt through an intermediate object, such as the revolver."[152]

Virtually all theories that the manner of death was not suicide assume that Mr. Foster did not previously possess the gun recovered from his hand at Fort Marcy Park. Apart from a variety of other compelling circumstantial and testimonial evidence (discussed below) that the gun belonged to Mr. Foster, the evidence regarding the pants pocket and oven mitt also tends to link Mr.

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[149] Lee Report at 492-93.

[150] *Id.* at 494.

[151] *Id.*

[152] *Id.*

Foster to the gun. Mr. Foster was found by police and rescue personnel with the gun that fired the fatal shot in his hand, and the oven mitt was found in the glove compartment in his car. There is no evidence, moreover, that anyone other than Mr. Foster did place or would have placed this or any other gun into Mr. Foster's pants pocket *and* into the oven mitt. Those pieces of evidence, when considered together and with all of the other evidence, tend to link Mr. Foster to the gun and thus tend to refute a theory that the manner of death was not suicide. The evidence regarding the pants pocket and oven mitt does not itself compel a finding as to location of death, but it is consistent with a scenario in which Mr. Foster transported the gun from the Foster home in the oven mitt,[153] and carried the gun in his pants pocket as he walked from his car in Fort Marcy Park to the berm near the second cannon.

h. Hairs and Fibers

In debris collected from Mr. Foster's clothing, the FBI Laboratory reported finding two blond to light brown head hairs of Caucasian origin that were suitable for comparison purposes and dissimilar to those of Mr. Foster.[154] The hairs did not appear to have been

[153] Statements by Foster family members provide circumstantial support for this part of the scenario. Lisa Foster and the Fosters' older son indicated that the oven mitt was usually in the kitchen, and they were unable to explain why it might have been in the Honda. Lisa Foster 302, 4/7/95, at 8; Older Son 302, 4/7/95, at 4.

[154] FBI Lab Report, 5/9/94, at 11; OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference). As explained above, the clothing was packaged together before trace evidence was obtained, and particular trace evidence cannot be conclusively linked to particular items of clothing that Mr. Foster was wearing at the time of his death.

forcibly removed.[155] Hair evidence can become important or relevant in a criminal investigation when there is a known suspect and a significant evidentiary question whether the suspect can be forensically linked to another person (a rape or murder victim, for example) or to a particular location.[156] If the suspect is a stranger to the victim or the scene, the presence of the suspect's hair is relevant in assessing whether he or she had contact with the victim or scene. In this case, however, the only known individuals who reasonably might have been compelled to provide hair samples were persons already known to have had contact with Mr. Foster.

The FBI Laboratory reported 35 definitive carpet-type fibers in the debris collected from the clothing. Of those fibers, 23 were white fibers. OIC investigators sought to determine a possible source for the fibers[157] — for the white fibers in particular, in light of the number of white fibers in comparison to the limited number of fibers of other colors.[158] The logical known sources for possible comparison were carpets from locations with which Mr. Foster was known to have been in contact—his car, home, and workplace. OIC

[155] OIC Investigators' Memorandum, 3/2/95, at 4 (Lab Conference).

[156] *See Crime Scene Investigation* 4-5 (Lee ed. 1994) (discussing importance of evidence linking a suspect with a victim).

[157] Carpet fibers cannot be conclusively identified as having a specific origin but can be identified for consistency with a particular origin. OIC Investigators' Memorandum (Lee).

[158] The remaining 12 were various colors, including blue gray, blue, gold-brown, light brown, gray, pink, and orange. No more than three fibers of any of these colors was found. OIC Investigators' Memorandum (FBI Lab Reports on Fibers). The variety of colors suggests that those fibers did not originate from a single carpet.

investigators obtained carpet samples from those sources, including from a white carpet located in 1993 in the house in Washington where Mr. Foster lived with his family. The FBI Laboratory determined that the white fibers obtained from Mr. Foster's clothing were consistent with the samples obtained from that carpet.[159]

In sum, therefore, the carpet fiber evidence—the determination that the white fibers were consistent with a carpet from the Fosters' house and the variety and insignificant number of other fibers—does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20.[160] Indeed, the fiber evidence, when considered together with the entirety of the evidence, is inconsistent with such speculation.

3. Eyeglasses

When found, Mr. Foster's body was located on a steep berm with his head higher than his feet and his feet pointed essentially straight down the berm. Mr. Foster's eyeglasses were recovered by Park Police Technician Simonello approximately 13 feet below Mr. Foster's feet.[161]

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[159] *Id.* The Laboratory also determined that four of the non-white fibers were consistent with samples obtained from the White House or Mr. Foster's car. *Id.*

[160] In addition, one of the 23 white carpet-type fibers was scraped from Mr. Foster's jacket and tie. That also contrasts with such speculation; the jacket and tie were in Mr. Foster's car at Fort Marcy (and not on his body) and were subsequently packaged separately from the other clothing.

[161] A report by Technician Simonello states: "Approximately 13 ft. downslope from the victim's feet (west) I observed a pair of prescription glasses laying on the ground." USPP Report (Simonello)

a. Blood

Dr. Lee stated that "[b]loodstains were found on both sides of the lenses" of Mr. Foster's eyeglasses.[162] These bloodstains "were less than or equal to 1 mm in size. In addition, blood-like and tissue-like materials were identified on the [fingerprint] lifts of the eyeglasses."[163]

b. Gunpowder

The FBI Laboratory found one piece of ball smokeless powder on the eyeglasses, and it was "physically and chemically similar" to the gunpowder identified in the cartridge case.[164]

c. Summary: Glasses

Dr. Lee stated that the above facts "support the interpretation that Mr. Foster was wearing his eyeglasses at the time the gun was discharged."[165] The analyses and conclusions of the experts and investigators in this and prior investigations reveal that the location where the glasses were found is consistent with the conclusion that Mr. Foster was wearing the glasses at the time the shot was fired.[166]

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at 1. The prescription was consistent with Mr. Foster's prescription, and the glasses contained marks on the earpieces consistent with Mr. Foster's habit of chewing the earpieces. FBI Lab Report, 5/9/94, at 11-12; Lisa Foster 302, 5/9/94, at 14.

[162] Lee Report at 493.

[163] *Id.*

[164] FBI Lab Report, 5/9/94, at 8; *see also* Lee Report at 489, 493.

[165] Lee Report at 493.

[166] *E.g.*, OIC Investigators' Memorandum (Lee).

4. Surrounding Area

a. Gunshot Residue in Soil

As part of his examination, Dr. Lee went to Fort Marcy Park with OIC investigators and obtained soil and other materials from the berm on which Mr. Foster's body was found.[167] Dr. Lee examined the soil samples; he reported that "[a] few unburned and partially deformed gunpowder-like particles were recovered from the soil in the area where Vincent Foster's body was found."[168] It cannot be determined "[w]hether these particles were deposited on the ground at the time of Mr. Foster's death or at any other period of time."[169]

b. Possible Bloodstains on Vegetation at Scene

Dr. Lee stated that one photograph of the scene "shows a view of the vegetation in the areas where Mr. Foster's body was found. Reddish-brown, blood-like stains can be seen on several leaves of the vegetation in this area."[170] He also noted that "[a] close-up view of some of these blood-like stains can be seen in [a separate] photograph."[171]

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[167] Lee Report at 422. No intensive review of the area under and around Mr. Foster's body occurred on July 20 or during the 1993 Park Police investigation.

[168] *Id.* at 489.

[169] *Id.*

[170] *Id.* at 495.

[171] *Id.* Dr. Lee said that "[i]f these stains are, in fact, blood spatters, this finding is consistent with the shot having been fired at the location where Mr. Foster's body was found." *Id.*

5. Contents of Bodily Fluids

During the 1993 investigation, the Laboratory of the Virginia Division of Forensic Science found that the blood, vitreous humor, and urine were negative for alcohols and ketones.[172] The Laboratory did not detect "phencyclidine, morphine, cocaine, [or] benzoylecgonine"; "other alkaline extractable drugs"; or "acidic [or] neutral drugs."[173]

The FBI Laboratory later conducted more sensitive testing and determined that the blood sample from Mr. Foster contained trazodone.[174] Trazodone was an antidepressant medication prescribed as Desyrel by Mr. Foster's physician on July 19, 1993, and Mr. Foster took one tablet that night, according to his wife.[175]

C. Review by Pathologists

Because of the importance of the forensic evidence to the conclusion about cause and manner of death, the OIC retained Dr. Brian Blackbourne as an expert pathologist to assist the investigation. Dr. Blackbourne

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[172] Commonwealth of Virginia, Division of Forensic Science, Certificate of Analysis, Case No. 93-353, 7/26/93 (Huynh).

[173] *Id.*

[174] FBI Lab Report, 5/9/94, at 8.

[175] Lisa Foster 302, 5/9/94, at 13. She produced to investigators the prescription container with 29 tablets enclosed. The label on the container indicated that it initially had contained 30 tablets.

Dr. Berman reported that "[o]ne pill would have had no significant therapeutic effect as the majority of those prescribed this drug do not report benefit for at least two weeks' treatment." Berman Report at 6.

The Lab also detected diazepam and nordiazepam below recognized therapeutic levels. FBI Lab Report, 5/9/94, at 8. Diazepam is valium, and nordiazepam is its metabolite.

reviewed the relevant reports, photographs, and microscopic slides; toured Fort Marcy Park; and interviewed Dr. Beyer, Dr. Haut, and FBI and Virginia laboratory personnel. He provided a report to the OIC summarizing his work on the forensic issues and setting forth his analysis.

Dr. Blackbourne concluded that Mr. Foster "died of a contact gunshot wound of the mouth, perforating his skull and brain."[176] Dr. Blackbourne based that conclusion "upon the autopsy report, diagrams and photographs and my examination of the microscopic slides of the entrance wound in the soft palate and posterior oropharynx which demonstrated excessive soot."[177]

Dr. Blackbourne concluded that Mr. Foster was alive at the time the shot was fired. Dr. Blackbourne based this conclusion

> upon the autopsy report and photographic evidence that there was bleeding beneath the scalp about the

[176] Blackbourne Report at 2. Mr. Fiske's Office previously retained a panel of pathologists to prepare a report. The pathologists were Dr. Charles S. Hirsch, Chief Medical Examiner for the City of New York; Dr. James L. Luke, Investigative Support Unit, FBI Academy; Dr. Donald T. Reay, Chief Medical Examiner for King County, Washington; and Dr. Charles J. Stahl, Medical Examiner, Armed Forces Institute of Pathology, Washington, D.C. These pathologists likewise reported that "the bullet wound of Mr. Foster's head and brain, with its vital reaction, represents the definitive cause of death." Pathologists' Report at 1.

[177] Blackbourne Report at 2. In his report, Dr. Lee similarly stated—based on examination of the scene photographs, the medical examiner's report, and the autopsy photographs—that "it is clear that Mr. Foster died as a result of a single gunshot wound," that "[t]he entrance of this wound was in his mouth," and that "the bullet appears to have exited through the back of Mr. Foster's head." Lee Report at 486.

> gunshot exit wound and beneath the fractures of the back of the skull. Such bleeding requires the heart to be beating at the time these injuries occurred. The autopsy report and my microscopic observation that blood was aspirated into the lungs requires that the person be breathing in order to suck the blood into the small air sacks of the lung.[178]

Dr. Blackbourne concluded that Mr. Foster "fired the gun with the muzzle in his mouth, his right thumb pulling the trigger and supporting the gun with both hands and with both index fingers relatively close to the cylinder gap (the space between the cylinder and the barrel)."[179] Dr. Blackbourne reasoned that "the dense deposit of soot on the soft palate and oropharynx indicated that the gun was discharged in close proximity to the soft palate."[180] In addition, the DNA from the muzzle of the gun was consistent with that of Mr. Foster.[181] Furthermore, "[t]he right thumb was entrapped within the trigger guard by the forward motion of the trigger after the revolver was fired."[182] Finally, Dr. Blackbourne stated that "[w]hen a revolver is fired, smoke issues out of the space between the cylinder and the barrel. This smoke will be deposited on skin, clothing or other objects close to the cylinder gap. The autopsy report indicates that smoke deposits were noted on the radial aspect of both right and left index fingers. Dr. Beyer told me that there was more deposit

[178] Blackbourne Report at 2.

[179] *Id.* at 4.

[180] *Id.*

[181] *Id.*

[182] *Id.*

on the right as compared to the left index fingers."[183] Dr. Blackbourne concluded that "[a]t the time of his death Vincent Foster was not under the influence of alcohol, narcotics, [or] cocaine."[184] Dr. Blackbourne based this conclusion upon the toxicology reports of the Virginia Division of Forensic Science Toxicology Laboratory and the FBI Laboratory; a meeting with the personnel of the FBI Laboratory; and a discussion with the toxicologist for the Virginia Division of Forensic Science who performed work on the Foster case in 1993.[185]

Dr. Blackbourne concluded that the gunshot wound that caused Mr. Foster's death occurred in Fort Marcy Park at the location where his body was discovered.[186] Dr. Blackbourne based this conclusion

> upon the fact that he would be immediately unconscious following the gunshot wound through the brain. Movement of the body, after the gunshot, by another person(s) would have produced a trail of dripping blood and displaced some of his clothing. If he had been transported from another location, such movement would have resulted in much greater blood soilage of his clothing (as was seen when he later was placed in a body bag and transported to

[183] *Id.* Similarly, the panel of pathologists concluded that the large quantity of gunpowder residue on the soft palate "indicates that Mr. Foster placed the barrel of the weapon into his mouth with the muzzle essentially in contact with the soft palate when he pulled the trigger." Pathologists' Report at 1. In addition, the pathologists noted that DNA consistent with that of Mr. Foster had been recovered from the muzzle of the revolver. *Id.*

[184] Blackbourne Report at 3.

[185] *Id.* at 4.

[186] *Id.* at 2.

> Fairfax Hospital and later to the Medical Examiner's Office). No trail of dripping blood was observed about the body on the scene. His clothing was neat and not displaced. The blood beneath the head and on the face and shoulder is consistent with coming from the entrance and exit wounds.[187]

Dr. Blackbourne concluded that the blood draining from the right nostril and right side of the mouth, as documented by Polaroid scene photographs, suggests that an early observer may have caused movement of the head.[188] Dr. Blackbourne based this conclusion

[187] *Id.* at 3. The panel of pathologists retained by Mr. Fiske's office similarly concluded that "death occurred where the body was found at Fort Marcy Park, Virginia. The relatively pristine nature of the exposed skin surfaces of the deceased and of his clothing precludes any other scenario. Substantially greater contamination of skin surfaces and clothing by spilled and/or smeared blood would have been unavoidable, had the body been transferred postmortem to the place where it was found. . . . There was no such contamination when the body was examined and photographed at the scene." Pathologists' Report at 2. The report continued: "[A] pool of blood was, in fact, found under the head of the deceased when the body was turned, and the upper back of his shirt was noted to be blood soaked." *Id.* at 3.

[188] Blackbourne Report at 4. Dr. Blackbourne stated that a mark on the side of the right upper neck, just below the jawline, seen in autopsy photographs, represents small fragments of dried blood and does not represent any form of injury. *Id.* Dr. Blackbourne based this conclusion upon his "experience in many autopsies. Blood dries overnight, prior to the autopsy. If one is not meticulous in washing the body prior to photographing it, small portions of blood may remain adherent to the skin. This mark is composed of two rectangular shaped dark spots approximately 2mm X 3mm. These marks have none of the features of a gunshot wound or other antemortem trauma." *Id.* at 5. Similarly, Dr. Hirsch, an expert pathologist retained during the Fiske investigation, examined the autopsy photographs and stated that

upon the fact that blood will pool in the mouth and nasopharynx while the heart is still beating following a gunshot wound of the back of the mouth. This blood may drain toward the dependent side of the head if the volume of blood exceeds the capacity of the mouth. There will be a thin trickle. The broad area of blood covering the right lower face, chin and right side of his neck and extending over the right shoulder and right collar of his shirt would result from the sudden drainage of all of the blood in his mouth. . . . This event occurred prior to taking the Polaroid scene photographs.[189]

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he saw "flecks of dried blood" depicted on the neck and that he saw "nothing in the photographs, and there certainly is nothing described in the autopsy to make me suspect that there is in any way any trauma to the side of his neck." OIC, 2/16/95, at 43, 45. The panel of pathologists further stated that, apart from the wound through the back of the head, "there was no other trauma identified." Pathologists' Report at 1. Dr. Beyer, who conducted the autopsy, was shown an enlarged autopsy photograph of the side of the neck, and said, "I see blood, but I don't see any trauma." OIC, 2/16/95, at 15. Dr. Lee reviewed the scene and autopsy photographs and evidence and indicated that there was only an entrance wound through the back of the mouth and an exit wound out the back of the head. Lee Report at 89-92, 486. The scene and autopsy photographs were reviewed during Congressman Clinger's probe and the Senate's inquiry into Mr. Foster's death, both of which concluded that he committed suicide by gunshot through the back of the mouth out the back of the head. Moreover, as outlined above, all six persons who attended the autopsy, and who therefore were able to examine the body itself, confirmed that there were no wounds on Mr. Foster's body other than the mouth-head bullet wound. *See supra* note 77, at 33-34.

[189] Blackbourne Report at 4. Similarly, the panel of pathologists stated: "A broad transfer-type blood smear was present at the right side of the chin and neck, precisely corresponding to a similar blood stain of the right collar area of the shirt. For obvious

Based on all of the above evidence, analyses, and conclusions, Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."[190]

VI. ISSUES RELATING TO EVIDENCE AT SCENE

Evidence from the scene and regarding the activities and observations of persons in and around Fort Marcy Park on July 20, 1993, raised certain issues requiring further investigative work.

A. Blood Transfer Stain

The Polaroids of the body at the scene depict, and many witnesses who observed the body at the scene describe, the position of the head as facing virtually straight, not tilting noticeably to one side or the other. The Polaroids depict a blood transfer stain in the area of the right side of the face. As explained in previous sections, the expert pathologists and Dr. Lee analyzed this blood evidence and the Polaroid photographs. They concluded, based on the blood transfer stain, that the head made contact with the right shoulder at some

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reasons, the head must have been facing to the right when the body was found or have been turned to the right when the body was being examined at the scene. In either circumstance, blood accumulated in the nose and mouth from the bullet defect of the soft palate and base of the skull would have spilled over the face and soiled the right shoulder and collar of the shirt." Pathologists' Report at 3. The transfer stain issue is discussed further below.

[190] Blackbourne Report at 5. The panel of pathologists reached the same conclusion. Pathologists' Report at 4. As reflected by the findings of the various pathologists and investigators, the fact that the gun was found in Mr. Foster's hand is consistent with this conclusion.

point before the Polaroids were taken. The testimony and contemporaneous reports point to the conclusion that rescue personnel at the scene handled the decedent's head to check for vital signs and open an airway.[191]

B. Quantity of Blood

Those who saw the body at Fort Marcy Park *after* it was lifted and rolled over at the scene described a quantity of blood behind Mr. Foster's head, under his body, and on the back of his shirt.[192] A reporter and

[191] Fornshill OIC, 1/11/95, at 92-93, 104, 105 (describing movements of FCFRD personnel Hall and Gonzalez around head of body); Hall Senate Deposition, 7/20/94, at 22 ("I recall attempting to check the carotid pulse."); Gonzalez Senate Deposition, 7/20/94, at 19 ("I believe Todd [Hall] did" check the pulse.); Gonzalez OIC, 1/10/95, at 56-57 (Hall may have checked for pulse); USPP Report (Hodakievic) at 1 ("Gonzoles [sic] notified me that . . . Gonzoles [sic] and Hall checked the body for vital signs and found none."); Iacone OIC, 1/10/95, at 22 (Iacone checked for pulse); USPP Report (Ferstl) at 1 ("Ofc. Fornshill advised that a medic checked the subjects [sic] neck for a pulse"); Gavin OIC, 2/23/95, at 15 (learned at scene that FCFRD personnel had checked for vital signs); USPP Report (Rolla) at 1 (FCFRD personnel "felt for a pulse in the carotid artery and got none."). The action of checking for vital signs and an airway may have caused some spillage of blood and may have caused the head to make contact with the right shoulder.

[192] Abt OIC, 2/9/95, at 30 ("We noted that there was a good amount of blood again on the back portion of the shirt and the collar, things like that."); Haut OIC, 2/16/95, at 13 ("[o]n the ground, underneath the head, there was a pool of congealed blood"); Hodakievic 302, 2/7/95, at 4 (recalls "lot of blood" underneath the decedent's head); Hodakievic OIC, 2/14/95, at 16 (describing blood on ground and on back of head and shirt when body moved); USPP Report (Rolla) at 1-2 ("I observed blood . . . underneath his head . . . . I rolled the decedent over and

Park Police officers separately visited the scene on July 21 and 22, 1993, and stated that they could identify the spot where the body had been located by the blood soaked into the ground.[193] A reporter placed a stick into the ground where the blood spot was located and estimated the blood depth at one-eighth inch.[194]

In addition, as Dr. Lee stated regarding the quantity of blood, the photographs at the autopsy reveal blood staining on the clothes that was not depicted at the scene.[195] Moreover, Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag.[196] These facts indicate that still more blood drained from the body during movement from the Fort Marcy scene to the autopsy.

observed a large blood stain three quarters down the back of the decedent's shirt."); Rolla 302, 4/17/96, at 4 ("When Rolla rolled the body he observed new, wet blood pouring out of the nose and possibly the mouth of the decedent. Rolla also observed a pool of blood, approximately 4-inches across, which had been under the head and neck area. Rolla also observed the back of the shirt was soaked with blood from the collar to the waist."); USPP Report (Simonello) at 1 ("When the body was turned onto its stomach I observed a large area of blood pooled where the head had been resting. . . . I also observed a larger area of blood where the victim's back had been, coinciding with blood stains on the back of shirt."); Simonello 302, 2/7/95, at 3 ("after the body was rolled, Simonello observed a large blood pool under the head of the decedent and on the back of the decedent's shirt").

[193] Reporter 302, 4/18/96, at 1 (recalled a blood spot approximately 12 inches in diameter); Hill 302, 3/1/95, at 3 (located position of body by blood stain on the ground).

[194] 302, 4/18/96, at 1.

[195] Lee Report at 490, 494.

[196] *Id.* at 495.

There has been occasional public suggestion, premised on the supposedly low amount of blood observed at the Fort Marcy scene, that blood must already have drained from the body elsewhere and that the fatal shot therefore must have been fired elsewhere. As revealed by the foregoing descriptions of the evidence, the underlying premise of this theory is erroneous: A quantity of blood was observed at the park under the body and on the back of the head and shirt. Moreover, the suggestion fails to account for the blood that subsequently drained from Mr. Foster's body during movement to the autopsy. The blood-quantity evidence, even when considered in isolation from other evidence, does not support (and indeed contravenes) a suggestion that the fatal shot was fired at a place other than where Mr. Foster was found at Fort Marcy Park.[197]

C. Unidentified Persons and Cars

The evidence establishes that at least three cars belonging to civilians were in and around the Fort Marcy parking lot area when the first Park Police and FCFRD personnel arrived: (1) Mr. Foster's gray Honda Accord with Arkansas tags; (2) the white Nissan with Maryland tags driven by C4; and (3) the broken-down blue Mercedes driven by C6. The three cars belonging to Mr. Foster, C4, and C6 are the only cars positively identified and known to law enforcement and the OIC that were in the Fort Marcy Park parking lot area in the 6:00-8:30 p.m. time frame and that belong to persons

[197] There also are a number of other items of evidence that contradict any such suggestion, as noted elsewhere in this report.

other than FCFRD personnel, Park Police personnel, towing personnel,[198] and Dr. Haut.

During the afternoon, before Park Police and FCFRD personnel were called to the scene at Fort Marcy Park, C2 saw a man in a car next to him; C3 and C4's statements suggest the presence of at least one man in the parking lot and perhaps a jogger;[199] and C6, after her car broke down, saw a man on the entrance ramp to the parking lot who asked her if she needed a ride.[200] Law enforcement and the OIC are not aware of

[198] A tow truck came to tow C6's car after the Park Police had arrived on the scene. Hodakievic OIC, 2/14/95, at 25. A tow truck later came to tow Mr. Foster's car. Raley's Towing Receipt, Case No. 30502; USPP Impounded Car Record, Case No. 30502.

[199] According to the reports of their interviews at the scene on July 20, 1993, C3 and C4 did not see anyone in or touching Mr. Foster's car. USPP Report, 7/20/93, at 1 (C3 and C4 interview). C4 said that a contrary statement in a report of an April 7, 1994, interview was inaccurate. 302, 2/2/95, at 2. C3 said simply that, at the time he provided subsequent statements in 1994 and thereafter, "he [wa]s not at all sure" of "his specific observations." 302, 2/2/95, at 3.

[200] Officer Fornshill stated that he was told later by Park Police personnel that there were what he described as "volunteers" along one of the trails in the park. Senate Deposition, 7/12/94, at 13; OIC, 1/11/95, at 93, 94. The evidence suggests that the people referred to as "volunteers" likely were C3 and C4. The investigators found C3 and C4 in the park but no "volunteers." In addition, the Park Service has uncovered no records that any Park Service workers were in the park near 6:15 p.m. on July 20, OIC Doc. No. DC-229-1, and no other witness known to the OIC saw such workers in the park.

After initially looking at the body, Todd Hall of the FCFRD said he thought he heard someone else in the woods and subsequently saw something red moving in the woods. 302, 3/18/94, at 2. Upon discovering during the course of a later interview that there was a road in the area where he had seen the motion, Hall believed it

the identities of the persons (other than C5) described by C2, C3, C4, and C6. There is no evidence that any of those unidentified persons (or any identified persons, for that matter) had any connection to Mr. Foster's death; and the totality of the forensic, circumstantial, testimonial, and state-of-mind evidence contrasts with any such speculation.

D. Car Locks

The Park Police investigators (Braun and Rolla) who entered and searched Mr. Foster's car at Fort Marcy Park said that they were able to enter the car without keys because the car was not locked.[201] James Iacone of the FCFRD stated that he had tried at least one of the doors and that it was locked.[202] That statement contrasts with that of Ralph Pisani of the FCFRD, who said that he, Jennifer Wacha, and Iacone looked into the

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could have been vehicular traffic. 302, 4/27/94, at 2. Hall later stated that "I seen something. It was woody and I seen something go past, like a car. . . . [I]t was probably a car or truck that drove past the bushes." Senate Deposition, 7/20/94, at 17-18. In another statement, Hall said that he "believe[d] someone was down there." OIC, 1/5/95, at 20. Hall believed that he saw something orange and that it was an orange vest. *Id.* at 22-23, 28. Hall said that he told an officer (Fornshill) when he made this observation and that Fornshill did not respond. *Id.* at 23. (According to Officer Fornshill, none of the rescue personnel said anything to the effect that someone was in the area. OIC, 1/11/95, at 93.) In yet another later statement, Hall said that he did not recognize this orange flash as a person. 302, 5/13/96, at 3.

[201] Braun 302, 4/24/96, at 2; Rolla 302, 4/17/96, at 5-6; *see also* USPP Report (Simonello) at 1 (car doors "had been c[l]osed but not locked"); Ferstl OIC, 1/11/95, at 98, 101-02, 118 (saw Braun open car, believes car was unlocked).

[202] 302, 3/11/94, at 3; OIC, 1/10/95, at 34; 302, 4/29/96, at 2.

Honda, but that no one tried the doors.[203] In any event, even were Iacone's recollection more accurate than the others,[204] the statement would be of uncertain significance, inasmuch as it is, of course, possible that one or more of the four doors was locked and one or more unlocked.[205]

E. Neighborhood

OIC investigators canvassed the area surrounding Fort Marcy Park to determine whether anyone observed, heard, or had knowledge of relevant activity on July 20.[206] That effort did not yield relevant information.[207]

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[203] 302, 3/11/94, at 2-3. Wacha did not recall that anyone determined whether the car was locked. OIC, 1/10/95, at 50.

[204] Two other witnesses gave changing accounts on the locked-car issue. Gonzalez said that when he returned to the parking lot from the body, he learned that both of the civilian vehicles were locked. 302, 4/27/94, at 4. In another statement, he said "I'd be guessing" as to whether the doors to Mr. Foster's car were locked. Senate Deposition, 7/20/94, at 96-97.

In one statement, Hall said that the doors of the car were locked. OIC, 1/5/95, at 52-53. In a Senate deposition, however, Hall stated "I don't recall" in response to the question "Did you know if the car was locked?" Senate Deposition, 7/20/94, at 28.

[205] There are a number of possible scenarios consistent with the evidence in which one or more of Mr. Foster's car doors could have been locked and one or more unlocked.

[206] There is no record of any effort to canvass the neighborhood near the time of the death to determine whether anyone had seen or heard relevant information.

[207] With respect to sound, Fort Marcy Park is adjacent to the thoroughfares of GW Parkway and Chain Bridge Road; planes to and from National Airport regularly fly in patterns near the park; and security officers at the nearby Saudi Ambassador's residence on Chain Bridge Road reported that construction was ongoing at

F. Pager

A Park Police evidence control receipt indicates that at the scene, Investigator Rolla took possession of Mr. Foster's pager from his right waist area. The receipt reveals that the pager, along with other personal property such as Mr. Foster's wallet, rings, and watch, were released to the White House on the evening of July 21 to be returned to the Foster family.[208] Investigator Rolla said that Mr. Foster's pager was off when he recovered it.[209] White House records of pager messages do not indicate messages sent to or from Mr. Foster on July 20.[210]

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that time. 302, 4/20/94, at 1; 302, 4/20/94, at 2; OIC Investigators' Memorandum (Fort Marcy Park).

[208] USPP Evidence/Property Control Receipt (Rolla) at 1-2.

[209] Rolla OIC, 2/9/95, at 27. Investigator Braun also said the pager was turned off. 302, 2/7/95, at 8. Investigator Abt's notes taken at the scene also indicate that the pager was turned off.

[210] OIC Doc. No. DC-210-2620.

VII. ISSUES RELATING TO CONDUCT OF INITIAL INVESTIGATION

Certain issues related to the conduct of the initial 1993 investigation into Mr. Foster's death warrant discussion in this report.

A. Photographs

Park Police Identification Technician Simonello took 35-millimeter photographs of Mr. Foster's body and of the scene.[211] Park Police investigators also took a number of Polaroids of Mr. Foster's body and of the scene. Polaroids taken at a crime or death scene develop immediately, and thus are useful in the event that problems subsequently occur in developing other film (as occurred here[212]).

Thirteen of the Polaroids provided to Mr. Fiske's office and the OIC are of the body scene, and five are of the parking lot scene. Of the 13 Polaroids of the body scene, eight are initialed by Investigator Rolla. The backs of the other five say "from C202 Sgt. Edwards 7-20-93 on scene."[213] Officer Ferstl said that he took Polaroids and, without initialing or marking them, gave them to Sergeant Edwards, who gave them to the investigators.[214] Sergeant Edwards does not recall taking Polaroids himself.[215]

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[211] Simonello OIC, 2/14/95, at 40-42.

[212] The 35-millimeter photographs were underexposed; thus, the Polaroids were of greater investigative utility.

[213] The handwriting on these photographs is that of Investigator Abt.

[214] OIC, 1/11/95, at 85, 87. Investigator Rolla initially suggested in a Senate deposition that he had taken photographs of the back of Mr. Foster's body. Senate Deposition, 7/21/94, at 89-90. After

B. Keys

Investigator Rolla said he felt into Mr. Foster's pants pockets at the scene in looking for personal effects.[216] Later, when it became apparent to Investigators Rolla and Braun that they did not have the keys to the car, they went to the hospital to check more thoroughly for keys.[217] The hospital logs indicate that Investigators Rolla and Braun were at the morgue at 9:12 p.m.[218] Investigator Braun thoroughly searched the pants pockets by pulling the pockets inside out, and she found two sets of keys.[219] She prepared an evidence receipt

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reviewing the Polaroids, Investigator Rolla stated that he intended to take such Polaroids, but he believes Investigator Braun took the Polaroid camera back to the parking lot before Dr. Haut arrived and the body was turned. 302, 4/17/96, at 4. The records are consistent with Investigator Rolla's statement, as the time "1930" is indicated on the back of the Polaroids taken by Investigator Braun at the parking lot scene, and Dr. Haut appears not to have arrived at the park until approximately 7:40 p.m.

[215] OIC, 1/12/95, at 7, 199-203. Investigator Abt recalled Sergeant Edwards taking Polaroids, OIC, 1/12/95, at 11, but Sergeant Edwards said he only carried the Polaroid camera and the Polaroids taken by Ferstl, but does not recall taking any Polaroids himself, OIC, 1/12/95, at 7, 199-203.

[216] OIC, 2/9/95, at 34-35. Investigator Rolla removed Mr. Foster's watch, pager, and two rings from the body at the scene. USPP Evidence/Property Control Receipt (Rolla) at 1. Investigator Rolla has said that he did not reach to the bottom of the suit pants pockets at the time he took personal effects into evidence at the scene. 302, 4/17/96, at 3.

[217] Rolla, OIC, 2/9/95, at 35-36; Braun OIC, 2/9/95, at 75-76.

[218] OIC Document No. DC-108-14. The safety and security officer at the hospital stated that he escorted Investigators Braun and Rolla to the body in the morgue. He described the entire incident as "very routine." 302, 4/13/95, at 1-2.

[219] Braun 302, 4/24/96, at 3; Braun OIC, 2/9/95, at 76.

indicating that the keys were taken from the right pants pocket, and she subsequently placed the keys in an evidence locker.[220]

C. X-Rays

Although no x-rays were produced from the autopsy, the gunshot wound chart in the autopsy report has a mark next to "x-rays made." Dr. Beyer has stated that either he did not take x-rays because the machine was not functioning properly at the time, or that if he attempted to take x-rays, they did not turn out. He stated:

> I had intended to take x-rays, but our x-ray machine was not functioning properly that day. And if we took any all we got was a totally black, unreadable x-ray, so I have no x-rays in the file. . . . I could very well have tried to use it on the Foster autopsy and got an unreadable x-ray. If his wound had been a penetrating wound, where there was only a wound of entrance, and the missile was retained within the body, then there would have been a requirement

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[220] USPP Evidence/Property Control Receipt (Braun) at 1-2. The evidence indicates that no persons other than police, rescue, medical, and hospital personnel had access to the body from the time when Investigator Rolla patted the pants at the park until the time when Investigator Braun recovered the keys in the pants pocket at the hospital. Two White House officials (William Kennedy and Craig Livingstone) viewed the body at the hospital, but the hospital logs reflect that they viewed the body near 10:30 p.m., OIC Doc. No. DC- 108-13—well *after* Investigators Braun and Rolla had retrieved the keys. Moreover, a Fairfax County Police officer stationed on regular assignment at the hospital that evening and a nursing supervisor escorted Mr. Kennedy and Mr. Livingstone, and allowed them to see the body only through a glass window. Officer 302, 2/10/95, at 2.

> that I have an x-ray. Since this was a perforating wound, where there was a wound of entrance and a wound of exit, and I was going to examine the tissue through which the missile path had taken, I concluded we could proceed without the x-ray, rather than delay it six to eight hours.[221]

Dr. Beyer's assistant recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly. The assistant stated that the machine sometimes would expose the film and sometimes would not. In this case, the assistant recalled moving the machine over Mr. Foster's body in the usual procedure and taking the x-ray. He said that he did not know until near the end of the autopsy that the machine did not expose the film.[222] In addition, like Dr. Beyer and the assistant, the administrative manager of the Medical Examiner's Office recalled "numerous problems" with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).[223]

With respect to the check of the x-ray box on the report, Dr. Beyer stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized.[224]

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[221] OIC, 2/16/95, at 17.

[222] 302, 9/11/95, at 2.

[223] 302, 1/27/95, at 1.

[224] Senate Hearing, 7/29/94, at 236, 242. The primary purpose of x-rays in this case, given the nature of the entrance and exit wounds, would have been to determine whether any bullet fragments remained in the head. Dr. Beyer said he felt "confident" without the x-rays that "you can examine the brain for a bullet or bullet fragments and identify them." OIC, 2/16/95, at 18. As previously set forth, Dr. Beyer, his assistant, and the four Park Police officers at the autopsy (Morrissette, Hill, Johnson, and Rule), all recalled that Dr. Beyer examined the head and brain (and dissected the brain) and found no bullet or fragments. *See supra* note 70, at 31-32. Officer Morrissette's report, prepared after the autopsy, stated that "Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head." USPP Report (Morrissette) at 1. As explained above, however, Dr. Beyer made that statement and reached that conclusion without x-rays.

VIII. OTHER ISSUES

Several other issues have arisen and been examined by the OIC.

A. Gun Observations and Ownership

The OIC conducted investigation and analysis with respect to the gun, both as to observations of the gun at the scene and ownership of the gun.

1. Observations of Gun at Scene

According to the testimony of the first three official personnel to find the body (Park Police Officer Fornshill and FCFRD personnel Hall and Gonzalez), the gun was in Mr. Foster's hand when they found the body (although Officer Fornshill himself did not see or look for it, but rather was told of it by the others). Those statements contrast with the testimony of C5, the individual who first saw Mr. Foster's body and did not see a gun. Careful evaluation of all of the circumstances and evidence leads to the conclusion that C5 simply did not see the gun that was in Mr. Foster's hand.

First, when questioned by the OIC, C5 agreed with a statement attributed to him in an interview report that "there was extreme dense and heavy foliage in the area

and in close proximity to the body, and the possibility does exist that there was a gun on rear of hand that he might not have seen."[225] That is supported, moreover, by the testimony of several witnesses establishing that the gun was difficult to see in Mr. Foster's hand when standing in a position above the head on the top of the berm.[226] That is further confirmed by Polaroids taken from above the head that reveal the difficulty of seeing the gun from that angle.

The forensic evidence and analyses outlined above also support the conclusion that the gun was in Mr. Foster's hand when C5 saw him. As explained by the pathologists and Dr. Lee, Mr. Foster's DNA was consistent with that on the muzzle of the gun, traces of blood evidence were derived from the gun, residue was on his hand, and residues were on his shirt. In addition, an indentation mark on his thumb suggests that the gun was in the hand for some period of time. The totality of the evidence leads to the conclusion that the gun recovered from Fort Marcy Park was in fact in Mr.

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[225] OIC, 2/23/95, at 52-53. C5 also had previously reviewed and adopted the interview report containing that statement. *See* 302, 4/14/94, at 4 (reviewed and initialed by witness).

[226] Abt OIC, 2/9/95, at 27 ("It was rather difficult for me to see, because I was looking from down the hill and the decedent's hand was covering part of the top of the gun."); Arthur OIC 1/5/95, at 52 ("I remember it kind of laying underneath the right hand"); Hall Senate Deposition, 7/20/94, at 22 (did not see gun until bent over); Hodakievic OIC, 2/14/95, at 14-15 ("Yes" in response to "was it difficult to see the gun?"); Rolla Senate Deposition, 7/21/94, at 22 ("it was difficult to see his right hand and the gun because of the plant and material around there"); Simonello OIC, 2/14/95, at 16-17 (gun was a "little difficult from a distance to observe . . . . The hand almost covered it entirely.").

Foster's hand when C5 happened upon the body, but that C5 simply did not see it.[227]

There are discrepancies in the descriptions of the color and kind of gun seen in Mr. Foster's hand.[228] However, the descriptions provided by the first two persons to observe the gun, as well as of numerous others, are consistent with the gun retrieved from the scene and depicted in the on-the-scene Polaroids.[229] That gun was taken into evidence by Technician Simonello on July 20, and has been maintained by law enforcement since then.[230]

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[227] On a separate issue, C5 saw what he described as a partially filled wine bottle near Mr. Foster's body. 302, 4/14/94, at 4. Investigator Rolla observed a bottle of what he thought was wine cooler about 15 feet to the right of the second cannon, but he recalled that the bottle was empty and its label faded. 302, 4/27/94, at 3; 302, 4/17/96, at 1. The bottle is not depicted in photographs of the scene, and it was not taken into evidence by investigators or the technician on the scene.

[228] These discrepancies are created by statements of FCFRD personnel Arthur and Iacone, which themselves are not consistent. Arthur stated that the gun was blackish-brownish but not a revolver (based on the fact that he did not recall seeing a cylinder). OIC, 1/5/95, at 46-47. After viewing a photograph of the weapon in the decedent's hand, Arthur stated, according to the interview report, "My memory is, I saw a semi-automatic, however, I must have been mistaken." 302, 4/24/96, at 2. Iacone stated that the gun was a silver-colored revolver-type weapon. 302, 4/27/94, at 3; OIC, 1/10/95, at 27.

[229] *See* Gonzalez 302, 5/15/96, at 4; Gonzalez OIC, 1/10/95, at 43 (saw black or dark revolver in hand); Hall OIC, 1/5/95, at 31 (saw black gun in hand); *see also* Wacha OIC, 1/10/95, at 41-42.

[230] There are minor (but insignificant on this record) differences in descriptions by FCFRD and Park Police personnel of the estimated number of inches from Mr. Foster's right hand to his

2. **Ownership of Gun**

One follow-up investigative issue concerning the gun relates to its ownership. Virtually all theories that the manner of death was not suicide rest on an assumption that the gun did not belong to Mr. Foster. But testimony, circumstantial evidence, and forensic evidence support the conclusion that the gun did in fact belong to Mr. Foster.

Mrs. Alice Mae Foster, Mr. Foster's mother, stated that Mr. Foster, Sr., died in 1991. He had kept a revolver in a drawer of his bedside table, in addition to other guns in the house.[231] In 1991, when Mr. Foster, Sr., had been ill and bedridden for a period of time, Mrs. Alice Mae Foster had all the handguns in the house placed in a box and put into a closet. Subsequent to the death of Mr. Foster, Sr., in 1991, Mrs. Alice Mae Foster gave Mr. Foster, Jr., the box of handguns.[232]

Mrs. Lisa Foster similarly recalls that her husband took possession of several handguns from his parents'

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thigh and of the exact position of the hand and gun in relation to the thigh.

[231] In August 1994, Sharon Bowman (the sister of Vincent Foster, Jr.) found five .38 caliber cartridges at the family home in Hope. 302, 12/1/94, at 1-2. That is further evidence suggesting that Mr. Foster, Sr., possessed a .38 caliber gun or guns. FBI Laboratory examination revealed that four of the cartridges were of the same manufacture (Remington) as in the revolver found in Mr. Foster's hand; they were manufactured at a different time than the cartridge and casing recovered from Mr. Foster's gun. FBI Lab Report, 2/21/95, at 2.

[232] 302, 5/2/95, at 1-2. Mrs. Alice Mae Foster and her long- time housekeeper viewed the gun recovered from Mr. Foster's hand, but they could not specifically identify it as one of the guns previously possessed by Mr. Foster, Sr. *Id.* at 2, 4.

house near the time of his father's death.[233] She recalled that, after they moved to Washington in 1993, some guns were kept in a bedroom closet.[234] She recalled what she described as a silver-colored gun[235] (she also has referred to it as a "cowboy gun"[236]), which had been packed in Little Rock and unpacked in Washington. She also recalled a .45 caliber semi-automatic pistol. She said she found one gun in its usual location on July 20, 1993,[237] the .45 caliber semi-automatic pistol.[238] She did not find the other gun on or after July 20, 1993.[239]

On July 29, 1993, Mrs. Foster was shown a photograph of the gun retrieved from the scene and, according to the Park Police interview report, was unable to identify it from the photograph.[240] On May 9, 1994, she was shown the actual gun that was recovered and said, according to the interview report, that the gun "may be a gun which she formerly saw in her residence in Little Rock, Arkansas" and that "she may have seen the handgun . . . at her residence in Washington."[241] She stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found,[242] although

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[233] 302, 5/9/94, at 16.

[234] *Id.*; 302, 4/7/95, at 7.

[235] 302, 5/9/94, at 15.

[236] 302, 11/8/95, at 3.

[237] 302, 5/9/94, at 16.

[238] 302, 11/8/95, at 3.

[239] *Id.*

[240] USPP Report, 7/29/93, at 2 (L. Foster interview).

[241] 302, 5/9/94, at 14, 15.

[242] 302, 11/8/95, at 2.

she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington.[243]

Webster Hubbell stated that, on the night of Mr. Foster's death, Lisa Foster went upstairs in the Foster house with him. While there, she looked into the top of a closet, pulled out a "squared-off" gun, and said, according to Hubbell, that one of the guns was missing.[244] To Hubbell's knowledge, the "other gun" was never found at the Foster house.[245]

Sharon Bowman, one of Mr. Foster's sisters, recalled that her father kept a black revolver in a drawer of his bedside table.[246] She said that she had retrieved various handguns from her parents' house, placed them in a shoebox, and put them in her mother's closet (and Ms. Bowman said they later were given to Mr. Foster, Jr.).[247] During the 1993 Park Police investigation, John Sloan, a family friend of the Fosters, wrote a letter to Captain Hume of the Park Police, stating that he had shown Sharon Bowman a photograph of the gun. According to the letter, Ms. Bowman stated that it "looked like a gun she had seen in her father's collection," and particularly pointed out the "'wavelike' detailing at the base of the grip."[248] Ms. Bowman was later shown the revolver recovered from Fort Marcy

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[243] *Id.*

[244] 302, 1/13/95, at 8; 302, 11/30/95, at 1. In December 1994, Mr. Hubbell was convicted of federal crimes relating to his billing practices as an attorney at the Rose Law Firm in Little Rock.

[245] 302, 11/30/95, at 2.

[246] 302, 4/11/95, at 2.

[247] *Id.*; 302, 6/6/94, at 2.

[248] Letter from John Sloan to Captain Hume in U.S. Park Police file.

Park. She indicated that it looked like one that her father kept in the house in Hope, but she could not positively identify it.[249]

Mr. Foster's other sister, Sheila Anthony, said she had no personal knowledge about the gun found in Mr. Foster's hand at Fort Marcy Park.[250] She recalled, however, that her sister, Sharon Bowman, and her brother had removed guns from their father's house near the father's death.[251]

Mr. Foster's older son said he knew his father had an old .38 caliber revolver. He saw it being unpacked at their house in Washington when they moved there. Mr. Foster told his son that he had received this gun from his father (Vincent Foster, Sr.). The older son did not know where the gun was kept in Washington. The son was unable to conclusively identify the gun recovered on July 20, 1993, from Mr. Foster's hand as the one he had previously seen.[252]

Mr. Foster's younger son stated that he saw one or two handguns in a shoebox along with a number of loose bullets while unpacking in Washington. The younger son stated that these items came from his grandfather's house. He described his grandfather's guns as a small, pearl-handled gun, and one or two revolvers. He believes his father placed the guns in a closet in Washington.[253]

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[249] 302, 4/11/95, at 2.

[250] 302, 4/28/94, at 1.

[251] *Id.*

[252] Older Son 302, 4/7/95, at 3.

[253] Younger Son 302, 4/7/95, at 2.

Mr. Foster's daughter stated she recalled someone unpacking a handgun at the house when they initially moved to Washington, although she never saw any other guns in their Washington house.[254]

To sum up, the testimony establishes that, near the time of his father's death, Mr. Foster took possession of some handguns that had belonged to his father. The testimony also establishes that guns, including (according to the older son) a .38 caliber revolver, were taken to Washington by the Foster family in 1993. Mrs. Lisa Foster said that she recalls two guns in a bedroom closet in Washington, one of which was missing when she looked in the closet after Mr. Foster's death, and that the missing gun was the one found at the scene. Ms. Bowman has said the gun found at the scene looks like a gun previously kept by her father.

In addition, forensic examinations of Mr. Foster's pants pocket and the oven mitt support the conclusion that Mr. Foster carried, and thus possessed, a gun at a time close to his death. As explained above, that evidence tends to link Mr. Foster to the gun recovered from his hand.

This combination of testimonial, circumstantial, and forensic evidence supports the conclusion that the gun found in Mr. Foster's hand belonged to Mr. Foster.

B. Briefcase

There are some discrepancies in statements regarding whether a briefcase was in Mr. Foster's car at Fort Marcy Park.

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[254] Daughter 302, 4/7/95, at 3.

Mr. Foster's black briefcase was in his office on July 22 when documents in the office were reviewed by Mr. Nussbaum in the presence of law enforcement officials. Four days later, a torn note was reportedly found in that briefcase by an Associate White House Counsel. To determine whether a briefcase (and perhaps that black briefcase) was in Mr. Foster's car at Fort Marcy Park, five related questions must be considered:

1. Did those who saw Mr. Foster leave the White House on July 20 see him with a briefcase?

2. Was a briefcase observed in Mr. Foster's car at Fort Marcy Park?

3. Did the Park Police return a briefcase to the Secret Service that evening?

4. Was a briefcase in Mr. Foster's office at the White House after his death?

5. How many briefcases did Mr. Foster use?

1. Mr. Foster's Departure from the White House

Linda Tripp, Betsy Pond, and Tom Castleton—all of whom worked in the Counsel's suite of offices—said they saw Mr. Foster leave the Counsel's suite on July 20. They were interviewed separately by the Park Police on July 22, 1993.

The Park Police report of the interview with Ms. Tripp states:

> Ms. Tripp makes it a habit to notice what the staff members are taking with them when they leave the office in order to determine for herself how long she may expect them to be away from the office. *Ms. Tripp was absolutely certain that Mr. Foster did not*

carry anything in the way of a briefcase, bag, umbrella, etc. out of the office.[255]

Ms. Tripp confirmed to the OIC that this report accurately reflected her recollection.[256]

The relevant portion of the Park Police report of Ms. Pond's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. In a later interview, Ms. Pond stated that "I think I remember his jacket swung over his shoulder" and said "[n]ot that I recall" to the question whether Mr. Foster was carrying a briefcase.[257]

The Park Police report of Mr. Castleton's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. When questioned over eight months later, Mr. Castleton recalled Mr. Foster carrying a briefcase,[258] and Mr. Castleton has said that it "looked very much like the one" that was in Mr. Foster's office on July 22.[259]

The testimony of Ms. Tripp, Ms. Pond, and Mr. Castleton thus conflicts as to whether Foster carried a briefcase when he left the Counsel's suite—two saying that he did not and one saying that he did.[260]

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[255] USPP Report, 7/22/93, at 1 (emphasis added) (Tripp interview).

[256] Tripp OIC, 6/21/95, at 9.

[257] Pond OIC, 4/26/95, at 29.

[258] 302, 5/3/94, at 2.

[259] OIC, 4/4/95, at 77.

[260] An officer of the Secret Service Uniformed Division stated that he saw Mr. Foster exit the West Wing onto West Executive Drive on July 20 around lunchtime. The officer said that he does not recall Mr. Foster carrying anything. 302, 4/20/94, at 2.

2. Mr. Foster's Car at Fort Marcy

The Park Police officers who searched Mr. Foster's car at Fort Marcy Park (Braun and Rolla) stated there was no briefcase in the car.[261] The Park Police technician who inventoried the car on July 21, E.J. Smith, stated that no briefcase was found.[262] The Polaroids of the interior of Mr. Foster's car taken at Fort Marcy Park, and the photographs taken the next day at the impoundment lot, do not show a briefcase in the car. (The photos from Fort Marcy show a white canvas bag in front of the rear seat on the driver's side of the car.)

In addition, four other persons at Fort Marcy Park specifically recall looking into Mr. Foster's car but do not recall a briefcase. Officer Fornshill of the Park Police stated that he looked into the car (although not closely) but did not see a briefcase.[263] Wacha, Iacone, and Pisani of the FCFRD also said that they did not recall seeing a briefcase.[264]

Four other persons have varying, but imprecise, degrees of recollection of a briefcase in *some* car at Fort Marcy Park.

Todd Hall of the FCFRD stated in a March 18, 1994, interview[265] and in a January 5, 1995, statement to the

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[261] Braun OIC, 2/9/95, at 70 ("there is no question, there was never a briefcase in that car"); Rolla 302, 2/7/95, at 4 (report: "Rolla stated that he did not observe any briefcase in the vehicle at all"). Technician Simonello also stated that he was "certain there was no briefcase" in the car. 302, 4/17/96, at 2.

[262] 302, 2/17/95, at 2-3.

[263] OIC, 1/11/95, at 147.

[264] Iacone 302, 4/29/96, at 2; Iacone OIC, 1/10/95, at 35; Pisani OIC, 1/10/95, at 25; Wacha OIC, 1/10/95, at 51-52.

[265] 302, 3/18/94, at 3.

OIC,[266] that he recalled a briefcase of uncertain color in the car with Arkansas plates. However, in a July 20, 1994, Senate deposition, he stated: "We saw a suit coat and I think his briefcase, something like that. . . . All I know for sure was his suit coat. And I thought I may have seen, he may have had a briefcase or something in there."[267]

George Gonzalez of the FCFRD said in one statement that he saw a black briefcase/attache case in the car with Arkansas plates.[268] In a later statement, however, Gonzalez stated, "I can't say if I saw a briefcase or papers. I can't correctly say whether I saw it or not. . . . I think the tie was in there and the jacket was in there. That's what I remember. That's all I can really remember."[269] He also said that what he recalled could have been a canvas bag that was found in Mr. Foster's car.[270] Gonzalez was not present when the Park Police entered the Honda.[271]

C5 testified that he "would just about bet" that a "brown briefcase" was in the car, although he "wouldn't bet [his] life on it."[272] C5's statements and a reenactment conducted with C5 at the scene by investigators reveal, however, that C5 was describing the car of C4,

[266] OIC, 1/5/95, at 53.

[267] Senate Deposition, 7/20/94, at 17, 27.

[268] 302, 2/23/94, at 3.

[269] Senate Deposition, 7/20/94, at 95.

[270] 302, 5/15/96, at 4. That bag is clearly shown in photographs of Mr. Foster's car taken at the scene and at the impoundment lot.

[271] Senate Deposition, 7/20/94, at 94.

[272] C5 OIC, 2/23/95, at 37.

not Mr. Foster's car, when he referred to the briefcase.[273]

C2 testified that he saw a briefcase—as well as wine coolers—in a car with Arkansas plates that was parked in the parking lot. He stated: "I looked and I saw the briefcase and saw the jacket, saw the wine coolers, it was two of them. I remember exactly how they were laying in the back seat of the car."[274] (There is no other evidence that wine coolers were in Mr. Foster's car.[275])

3. Park Police Communications with Secret Service

An official Secret Service report prepared at 10:01 p.m. on July 20 states in relevant part:

> SA Tom Canavit, WFO PI squad, advised that he has been in contact with US Park Police and was assured that if any materials of a sensitive nature (schedules of the POTUS, etc.) were recovered, they would immediately be turned over to the USSS. *(At the time of this writing, no such materials were located).*[276]

[273] OIC Investigators' Memorandum, 3/1/96, at 44; C3 302, 2/2/95, at 1 (stated that he "may have had a briefcase" in C4's car).

[274] C2 OIC, 11/1/95, at 34.

[275] C3 and C4, who drove together to Fort Marcy Park, said there were wine coolers and possibly a briefcase in C4's car. C4 302, 4/7/94, at 3; C3 302, 2/2/95, at 1. Based on the estimated times provided by the witnesses, C2 would appear to have left the park before C3 and C4 arrived together.

[276] OIC Doc. No. DC-211-147 (emphasis added); *see also* Canavit 302, 8/3/95, at 2. Park Police Lieutenant Gavin's typewritten notes of that evening reflect that Canavit had inquired about "WH passes, classified docs in vehicle."

4. **Mr. Foster's Office at the White House**

White House employee Patsy Thomasson testified that she saw Mr. Foster's briefcase by the desk in Foster's office on the night of July 20 and indeed looked into the top of that briefcase for a note.[277] As noted above, the testimony of White House, Department of Justice, FBI, and Park Police personnel confirms that Mr. Foster's black briefcase was in his White House office on *July 22*, two days after his death, during the review of documents in Mr. Foster's office.

5. **Mr. Foster's Briefcase**

The OIC is aware of only one briefcase used by Mr. Foster,[278] the black briefcase that Ms. Thomasson observed in Mr. Foster's White House office on the night of July 20 and that a number of other witnesses observed there on July 22.

6. **Summary: Briefcase**

Based on careful consideration of all of the evidence, the conclusions significantly supported are: (a) Mr. Foster's black briefcase remained in his office when he left on July 20; and (b) neither it nor another briefcase was in his car at Fort Marcy Park.

C. Notification

According to Secret Service records, the Secret Service was notified of Mr. Foster's death at about 8:30

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[277] OIC, 8/31/94, at 32.

[278] *See* Gorham 302, 3/16/95, at 7; Lisa Foster 302, 4/7/95, at 6; Older Foster Son 302, 4/7/95, at 4. Mr. Foster also possessed a large brown litigation bag that was seen in his office on July 22 during the review of documents.

p.m. Eastern time on July 20.[279] The records reflect that various White House officials were then contacted.[280]

An Arkansas Trooper has stated that, while on duty at the Arkansas Governor's Mansion, he was notified of Mr. Foster's death by Helen Dickey, at the time a 22-year-old personal assistant of the Clintons who lived on the third floor of the White House Residence.[281] The trooper described Dickey as "hysterical" and "very upset" when she called.[282] The trooper, who was working a shift until 10:30 p.m. Arkansas time that night,[283] stated that Dickey called him before 7:30 p.m. Arkansas time (8:30 p.m. Eastern time); according to the interview report, he said "he could possibly be mistaken about the time the call from Dickey was received. The call could have been as late as 8:30 PM, Arkansas time. However, he still felt his best recollection was that the

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[279] OIC Doc. No. DC-211-147.

[280] *Id.* The Secret Service records reveal that David Watkins and Craig Livingstone were the first two White House officials notified (they were notified by different Secret Service personnel). *Id.*

[281] 302, 11/9/95, at 2. The trooper said that Dickey's conversation was "very disjointed," *id.*, and that, although he could not recall her precise words, Dickey told him that Mr. Foster had committed suicide in his car at the White House. 302, 6/2/95, at 1. The trooper said that he learned later that Mr. Foster committed suicide at Fort Marcy Park. *Id.* In addition to the other evidence, the evidence regarding Mr. Foster's car (photographs of its interior and statements about the search of it) clearly demonstrates that Mr. Foster did not commit suicide there.

[282] 302, 6/2/95, at 1; 302, 11/9/95, at 2.

[283] 302, 11/9/95, at 1.

call was received sometime between 4:30 PM and 7:30 PM [Arkansas time]."[284]

Helen Dickey stated that she was first notified of Mr. Foster's death by an employee of the White House Usher's Office at about 10:00 p.m. and that she became very upset.[285] (The Dickeys had lived next door to the Fosters in Little Rock when Helen was younger.[286]) She then contacted her mother in Virginia and her father in Georgia from a phone on the second floor of the White House Residence.[287] Dickey stated that she later called (from a different phone) the Arkansas Governor's Mansion and talked to the trooper at approximately 10:30 p.m. Eastern time.[288]

There are two other pieces of relevant evidence with respect to Ms. Dickey's statement. First, Ms. Dickey's diary entry for July 20 (written within a few days of the event) states in relevant part:

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[284] *Id.* at 3. Another Arkansas trooper stated that the first trooper called him soon after the Dickey call. This second trooper "placed the time of this telephone call at approximately 6:00 PM" Arkansas time. 302, 11/9/95, at 1.

[285] 302, 2/7/96, at 1.

[286] Dickey 302, 10/31/94, at 1.

[287] Dickey 302, 2/7/96, at 2.

[288] *Id.* at 3. White House Residence phone records indicate that a call was placed to the number of Dickey's father at 10:06 p.m. OIC Doc. No. DC-95-7; Dickey 302, 2/7/96, at 2. A call to the Arkansas Governor's Mansion is not reflected on these records. As indicated, the call may have been made from a phone in the White House not on the floors of the White House Residence: The Usher's Office employee who notified Dickey recalls Dickey making a call, but not in the Residence, soon after he had notified her. 302, 5/21/96, at 2. Complete records for such calls are not available.

> I watched [Larry King Live] and about 10:30 [the Usher's Office employee] came up and told me they had found Vince Foster's body and that he'd killed himself. I waited for the punchline and lost it. I called Mom and Dad . . . . We went to Lisa's, and everyone was there . . . .[289]

Second, the Usher's Office employee confirmed that he notified Ms. Dickey of Mr. Foster's death shortly after 10:00 p.m. and said that Ms. Dickey immediately became hysterical, started screaming and crying, and ran downstairs.[290] The Usher's Office employee "firmly believes he was the first to inform Dickey of the news of Foster's death because of her extreme reaction to the news."[291]

The totality of the evidence—including the diary entry, the testimony of the Usher's Office employee, and the lack of any other evidence that White House or Secret Service personnel had knowledge of Mr. Foster's death at a time earlier than when the Park Police first notified the Secret Service—does not support a conclusion that Ms. Dickey knew about Mr. Foster's death at some earlier time.[292]

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[289] OIC Doc. No. DC-348-8.

[290] 302, 5/21/96, at 2.

[291] *Id.*

[292] Precise recollections of time, if not tied to a specific event that can be documented as having occurred at an exact time, can, of course, be imprecise or inaccurate. Here, the recollection is tied neither to a specific event nor to an exact time. The recollection instead is of a general three-hour period of time in which the call might have been received. The recollection is not reflected in a contemporaneous document.

D. Search for Bullet

During the Park Police, Fiske, and OIC investigations, searches were conducted of Fort Marcy Park for the bullet that caused Mr. Foster's death.

On July 22, 1993, four Park Police personnel (Hill, Johnson, Rule, and Morrissette) searched with a metal detector the immediate area where the body was found. Their search for the bullet was unsuccessful.

Investigators in Mr. Fiske's Office conducted a search in the area where Mr. Foster's body was found. Their search for the bullet fired from Mr. Foster's gun was unsuccessful.[293]

With the assistance of Dr. Lee, the National Park Service, and a large number of investigators, the OIC organized a broader search of Fort Marcy Park for the fatal bullet. The search was led by Richard K. Graham, an expert in crime scene metal detection. The search plan was devised utilizing information obtained through ballistics tests performed by the Army Research Laboratory, Aberdeen Proving Grounds, Maryland.

The search did not locate a bullet fired from the gun recovered from Mr. Foster's hand. That the search did not uncover the fatal bullet does not affect the conclusion that Mr. Foster committed suicide in Fort Marcy Park. Because a search covering the maximum range estimates "would have included a vast area . . ., a search which was limited in scope to the highest probability areas, closer to the minimum range estimates, was undertaken."[294] In other words, while the OIC search covered a broader area than previous

[293] Fiske Report at 47.

[294] 302, 9/12-10/31/95, at 4 (Investigators' Report of Search).

searches, "the maximum range estimates" predicted the possibility that "the bullet could have cleared the tree tops in Ft. Marcy and landed well outside the park."[295] Moreover, although lines ultimately were laid out within the park along the outer limits of a 90 degree arc to a distance of 175 meters,[296] which represented the "highest probability areas,"[297] a full search of even the 90 degree-175 meter range would have included areas outside the park that were not searched.[298] In addition, because "dense foliage and trees surround the area where Foster's body was discovered, and since there is a . . . cannon approximately 12.5 feet directly behind the location where the body lay, there is a distinct possibility the bullet's trajectory was altered due to its striking or ricocheting off a natural or man-made obstruction."[299] Another variable is that "Foster's head could have been turned to one side or the other when the shot was fired."[300]

IX. STATE OF MIND

In a death investigation, state-of-mind evidence can buttress the forensic and other evidence and, in that respect, is an issue within the scope of the investigation. For that reason, the OIC intensively examined Mr. Foster's state of mind and activities before his death. The OIC reconstructed and examined previously unreviewed documents from Mr. Foster's White House office. The OIC sought relevant documents from

[295] *Id.*

[296] *Id.* at 7.

[297] *Id.* at 4.

[298] *Id.* at 7-8.

[299] *Id.* at 4.

[300] *Id.* at 5.

other sources. The OIC interviewed Mr. Foster's wife, sisters, mother, children, and other relatives; numerous friends in Arkansas and Washington; many colleagues who worked closely with him at the Rose Law Firm or the White House; and various other persons with potentially important information. During this effort, the OIC gathered extensive evidence relating to Mr. Foster's state of mind and activities.

The OIC is grateful to the Foster family members—including Alice Mae Foster, Lisa Foster, Sharon Bowman, Sheila Anthony, Beryl Anthony, and the Foster children, among others—for cooperating with this and prior investigations under painful and difficult circumstances. Lisa Foster and Mr. Foster's mother, Alice Mae Foster, not only spoke with OIC investigators at some length, but also provided additional information and assistance at their homes in Arkansas.

A. Dr. Berman's Analysis

Suicide, perhaps contrary to popular understanding, is a common manner of death in the United States. According to the Centers for Disease Control (CDC), suicide was the ninth leading cause of death among Americans in the period from 1980 through 1992. The CDC's statistics reveal that more individuals in the United States died by suicide than by homicide in every year since 1981.[301] In the United States in 1993, 31,102 individuals committed suicide, and 18,940 of them committed suicide with a firearm.[302] During 1993,

[301] Centers for Disease Control and Prevention, *Suicide in the United States, 1980-1992* 2 (1995).

[302] These figures were provided by the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention.

therefore, there were approximately 85 suicides per day, and 52 suicides by firearm per day, in the United States.

The OIC retained Dr. Alan Berman to review and analyze state-of-mind evidence gathered by the OIC in the course of its investigation. Dr. Berman, as noted above, has extensive experience and expertise in the study of suicide. He examined the evidence and reported his findings to the OIC.

In his report, Dr. Berman first noted that "[d]escriptors used by interviewees with regard to Vincent Foster's basic personality were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."[303]

Mr. Foster's life, after "arriving in Washington, was filled with long, intense and demanding hours of work."[304] Dr. Berman noted that Mr. Foster's May 8 commencement address to the University of Arkansas School of Law was "replete with reflections upon and regret regarding the changes wrought by his experiences in Washington."[305] Mr. Foster had "uncharacteristically . . . talked of quitting,"[306] but considered a return to Little Rock to be a "humiliation."[307]

[303] Berman Report at 3. Dr. Berman noted that "[r]ecent studies . . . have documented a significant relationship between perfectionism and both depression and suicidality, particularly when mediated by stress." *Id.* at 13.

[304] *Id.* at 3.

[305] *Id.* at 5.

[306] *Id.* at 13.

[307] *Id.* at 7.

Dr. Berman reported that "[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock."[308] The torn note "highlights his preoccupation with themes of guilt, anger, and his need to protect others."[309]

Dr. Berman noted that Mr. Foster's admission to his sister on the Friday before his death that he was depressed was a "profound expression of his depression."[310] Dr. Berman also noted Mr. Foster's July 19 call to Dr. Larry Watkins in Little Rock, during which Mr. Foster referred to symptoms of a mild depression and to stress, criticism, and long hours.[311]

Dr. Berman stated that Mr. Foster was "not a help-seeker"[312] and was "reluctant to seek help" although he was "[a]ware he was in trouble psychologically."[313] Dr. Berman stated that "[t]his difficulty accepting the vulnerable position is common to successful executives."[314] Dr. Berman stated that "[b]y the Friday before his

[308] *Id.* at 14.

[309] *Id.* at 4.

[310] *Id.* at 7.

[311] *Id.* at 6.

[312] *Id.* at 13.

[313] *Id.* at 14.

[314] *Id.*

death he was desperate; calling for names of psychiatrists was a clear . . . admission of his failure. He was ambivalent and fearful about this help-seeking."[315] He ultimately "preferred the safety of his family physician . . . to the immediacy and presence of other, unknown professionals in the DC area."[316]

Dr. Berman said that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability."[317] Dr. Berman concluded, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, subclinically even before this."[318] Dr. Berman noted that there was some history of depression in the family.[319]

Dr. Berman explained that for certain executives facing difficult circumstances, "[i]n essence, death is preferred to preserve one's identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a self-view and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system."[320]

As to why Mr. Foster was overwhelmed at that particular time, Dr. Berman explained that Mr. Foster was "under an increasing burden of intense external stress, a loss of security, a painful scanning of his environment for negative judgments regarding his performance, a rigid hold of perfectionistic self-demands, a

[315] *Id.*

[316] *Id.* at 13.

[317] *Id.* at 10.

[318] *Id.* at 9.

[319] *Id.* at 6.

[320] *Id.* at 14.

breakdown in and the absence of his usual ability to handle that stress primarily due to the impact of a mental disorder which was undertreated."[321]

Mr. Foster apparently did not leave a note that specifically refers to or contemplates suicide. Dr. Berman indicated that the great majority of persons committing suicide do *not* leave a note.[322] Dr. Berman also stated, with respect to the lack of a note in this case, that Mr. Foster was "intensely self-focused at this point; overwhelmed and out of control."[323]

As to the Fort Marcy Park location, Dr. Berman stated that Mr. Foster "was ambivalent to the end" and may have driven for a while before going to Fort Marcy Park.[324] He may have "simply and inadvertently happened upon the park or he may have purposely picked it off the area map found in his car."[325] Dr. Berman stated that Mr. Foster's suicide in Fort Marcy Park is "[s]imilar to the typical male physician who suicides by seeking the guaranteed privacy of a hotel room, and a 'do not disturb' sign."[326]

In sum, Dr. Berman, based on his evaluation of the evidence, concluded: "In my opinion and to a 100% degree of medical certainty, the death of Vincent Foster

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[321] *Id.* at 15.

[322] *Id.*

[323] *Id.* With respect to Mr. Foster's eating lunch on July 20, Dr. Berman stated that "[t]here is no study in the professional literature that has examined eating behavior prior to suicides" and that "even death row inmates, knowing they are to die within a short time, eat a last meal." *Id.* at 14.

[324] *Id.*

[325] *Id.*

[326] *Id.*

was a suicide. No plausible evidence has been presented to support any other conclusion."[327]

B. Evidence

The OIC, like other investigations before, is not aware of a single, obvious triggering event that might have motivated Mr. Foster to commit suicide. Therefore, the following is simply a brief outline of some of the evidence relevant to the ultimate determination that Mr. Foster's state of mind was consistent with suicide. This outline is not designed to set forth or to suggest some particular reason or set of reasons why Mr. Foster committed suicide. Rather, the issue for purposes of the death investigation is *whether* Mr. Foster committed suicide, and this outline is designed to show that, as Dr. Berman concluded, compelling evidence exists that Mr. Foster was distressed or depressed in a manner consistent with suicide.[328]

To begin with, in his six months in the White House, Mr. Foster was involved in work related to a number of important and difficult issues. The issues included, for example, the appointments and vetting of an Attorney General, a Supreme Court Justice, as well as many others (some of which developed into difficult situations abounding with unfavorable public comment); legal issues related to health care, such as medical

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[327] *Id.*

[328] The OIC has been mindful of and sought to comply with the requirement of restraint imposed by the Independent Counsel Reauthorization Act of 1994: The reporting requirement is not "intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness." H.R. Conf Rep. No. 103-511, at 19 (1994).

malpractice reform; litigation related to the Health Care Task Force; the dismissal of White House Travel Office employees and the ensuing fallout from that incident; the Clintons' tax returns (which involved an issue regarding treatment of the Clintons' 1992 sale of their interest in Whitewater); the Clintons' blind trust; liaison with the White House Usher's Office over issues related to the White House Residence; and issues related to the Freedom of Information Act.[329]

The work proved to be difficult and stressful. In a letter to a friend in Arkansas on March 4, 1993, for example, Mr. Foster wrote: "I have never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"[330]

During that six-month period, certain other aspects of Mr. Foster's life also came under some scrutiny. For example, in May 1993, a controversy arose over membership of Administration officials in the Country Club of Little Rock, which had had no black members. Mr. Foster was a member of that club and resigned from it that month. On a copy of a May 11, 1993, newspaper

[329] This summary report is not an appropriate forum for an exposition of substantive events under investigation by the OIC—including Whitewater, Madison, and Travel Office issues—and Mr. Foster's possible relationship to those events. Those investigations have not concluded, and it thus would be inappropriate to publicly disclose evidence on such matters. In any event, much information on those subjects is publicly accessible in reports of congressional committees and federal agencies, in several books, and in numerous media articles and reports.

[330] OIC Doc. No. DC-210-5573.

article in Mr. Foster's office that mentioned the controversy, Mr. Foster wrote, "I wish I had done more."[331]

At the same time, the White House staff generally was subject to media criticism during the first six months of the Administration. Some public criticism suggested incompetence, if not malfeasance, by staff members. Mr. Foster himself was mentioned in some of the critical editorial commentary.[332] Numerous witnesses said that Mr. Foster was concerned and/or upset over the press criticism.[333] According to Mr. Foster's brother-in-law, former Congressman Beryl Anthony, Mr. Foster said words to the effect that he had "spent a lifetime building [his] reputation" and was "in the process of having it tarnished."[334] As Dr. Berman noted, reputation was clearly important to Mr. Foster. Indeed, in the May 8, 1993, commencement address, Mr. Foster said that "[d]ents to the reputation in the legal profession are irreparable" and that "no victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He emphasized that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."

[331] OIC Doc. No. DC-210-3907.

[332] *See Who Is Vincent Foster?*, Wall St. J. June 17, 1993, at A10; *Vincent Foster's Victory*, Wall St. J., June 24, 1993, at A12.

[333] *See, e.g.*, Beryl Anthony 302, 4/11/95, at 2; Sheila Anthony 302, 4/28/94, at 4; Alice Mae Foster 302, 5/2/95, at 2; Lisa Foster 302, 4/7/95, at 8; Hockersmith 302, 8/31/95, at 3; Kennedy 302, 5/6/94, at 4-5; Lindsey 302, 6/22/94, at 2; Lyons OIC, 7/25/95, at 19-21; Scott 302, 6/9/94, at 3; Thomases OIC, 7/7/95, at 36-37; Tripp 302, 3/27/95-3/28/95, at 2-3.

[334] USPP Report, 7/27/93, at 1 (Beryl Anthony interview).

In that commencement address, Mr. Foster also noted that there will be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He advised to "[t]ake time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself." He suggested that "[i]f you find yourself getting burned out or unfulfilled, unappreciated[,] . . . have the courage to make a change."

The Travel Office matter, in particular, was the subject of public controversy beginning in May 1993 and continuing through Mr. Foster's death. Criticism focused on the White House's handling of the matter before and after the May 19 firings. Legislation enacted on July 2, 1993, required the General Accounting Office (GAO) to investigate the Travel Office firings. There was a possibility of some form of congressional review, or perhaps special counsel investigation, as well as the GAO investigation.[335] During the week of July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident.[336]

At some point in the last weeks of his life, Mr. Foster wrote a note[337] that he had "made mistakes from

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[335] *See, e.g., Appoint Special Counsel*, USA Today, July 19, 1993, at 10A; *The Travel Office Controversy Isn't Over*, Wash. Times, July 12, 1993, at F2; *A Stealthy, Evasive Confession*, N.Y. Times, July 11, 1993, at § 4, p. 18.

[336] *See* Beryl Anthony 302, 4/11/95, at 2; Beryl Anthony OIC, 6/25/96, at 5-6; Lyons 302, 5/12/94, at 3; Lyons OIC, 7/25/95, at 32-33.

[337] This note is not dated. Because it refers to the Travel Office incident, Mr. Foster must have written it at some point in the last several weeks of his life. The FBI Laboratory found one latent print on the note and later determined that the print belonged to

ignorance, inexperience and overwork" and that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."[338]

Bernard Nussbaum. FBI Lab Report, 7/5/95, at 1. (Mr. Nussbaum handled the note after its discovery and before its production to the Park Police.) The note already was torn into pieces when produced to the Park Police; as received by Mr. Fiske's Office and the OIC, there was one missing piece to the note. The missing piece is from the bottom portion of the page, which appears to be blank.

[338] At the request of the OIC, the FBI Laboratory compared the original note to four original pages of known writing of Mr. Foster that the OIC had obtained from the documents that were in Mr. Foster's office at the time of his death. The Laboratory determined that the note and these four sheets were written by the same person (Vincent Foster). FBI Lab Report, 11/9/95, at 1.

The OIC also retained an independent handwriting expert, Gus R. Lesnevich. Mr. Lesnevich served in the Questioned Document Section of the U.S. Army Criminal Investigation Laboratory in Vietnam. In 1974, he joined the United States Secret Service and in 1976 became Senior Document Examiner at the Secret Service Identification Branch. In 1981, he entered private practice and has worked as an expert for federal and state law enforcement agencies, Legal Aid, and public defenders. He has qualified and testified as an expert witness in numerous state and federal courts throughout the United States. He was retained as a government expert in six cases in the Iran-Contra matter, and he has been retained in numerous other high-profile federal criminal cases.

In this matter, Mr. Lesnevich compared the original note to four original pages of known writing of Mr. Foster that were in his office at the time of his death; to one other original page of paper that was known to have been written by Mr. Foster; and to 18 original checks bearing the known writing of Mr. Foster. Mr. Lesnevich concluded that the written text on the note "contained normal, natural and spontaneous writing variations. These normal, natural and spontaneous writing variations can be found in the letter formations, beginning strokes, ending strokes, connecting

During that same period, according to Mr. Foster's immediate superior, Counsel Bernard Nussbaum, Mr. Foster's work effort decreased noticeably.[339] According

strokes, etc." Lesnevich Report at 2. He further concluded that "examination and comparison of the questioned written text appearing on the note with the known writing on the [known] documents has revealed that the author of the known documents wrote the note." *Id.* (reference numbers omitted). Mr. Lesnevich prepared a thorough 51-page comparison chart "that points out and illustrates a number of the normal, natural and spontaneous writing habits that were found common between the written text appearing on the questioned note and the known handwriting of Vincent Foster found on the [submitted known] documents." *Id.* at 3.

Previous investigations also commissioned handwriting analyses of the note. At the request of Mr. Fiske's office, the FBI Laboratory performed a handwriting analysis of the original note, comparing it to a "[h]andwriting sample bearing the purported known writing of Vincent Foster" and determined that the note was written by the same person who wrote the known sample. FBI Lab Report, 6/17/94, at 1-2. At the request of the Park Police, the United States Capitol Police performed a handwriting analysis of the note, comparing it to a copy of a handwritten letter of Mr. Foster that had been provided by Mrs. Foster. The U.S. Capitol Police concluded that "[b]oth the Known and Questioned Documents were completed by the same writer/author and that writer/author is known as Vincent W. Foster." Report of United States Capitol Police, Identification Section, 7/29/93, at 2.

The number of examinations, the experience and expertise of the many different examiners, the variety and quantity of known-sample documents, the fact that the examinations commissioned by the OIC and Mr. Fiske's Office were conducted with original documents (as opposed to photocopies), and the unanimity of the examiners in their conclusions together lead clearly to the conclusion that Mr. Foster wrote the note.

[339] Nussbaum 302, 6/8/95, at 6. Another witness said that he was told by Mr. Nussbaum that Mr. Foster's work product had deteriorated and that Mr. Foster had seemed distracted. 302, 10/23/95, at 14.

to William Kennedy, Sheila Anthony, and Lisa Foster, Mr. Foster said he was considering resigning.[340]

Mr. Foster's sister Sheila Anthony said that Mr. Foster told her on Friday, July 16 that he was depressed. She furnished him the names of three psychiatrists.[341] Mr. Foster did not speak to any of the three psychiatrists,[342] although phone records show that Mr. Foster attempted to contact one of them on July 16.[343] When Mr. Foster was found at Fort Marcy Park, a list of the three psychiatrists was in his wallet.[344]

Lisa Foster said that her husband cried while talking to her on Friday night, July 16 and that Mr. Foster mentioned resigning during the weekend of July 16-18.[345]

Meanwhile, Mr. Foster's mother, Alice Mae Foster, said that she talked to her son a day or two before his death and that he said he was unhappy because of his job and that it was "such a grind."[346]

On Monday, July 19, Mr. Foster contacted Dr. Larry Watkins, his physician in Little Rock, and was prescribed an antidepressant. Watkins' typed notes of July 21 say the following:

[340] Lisa Foster 302, 5/9/94, at 15; Kennedy OIC, 3/2/95, at 66- 67; Sheila Anthony 302, 4/28/94, at 9.

[341] Sheila Anthony 302, 4/28/94, at 7-8; *see also* USPP Report, 7/27/93, at 1 (Beryl Anthony interview); USPP Report, 7/29/93, at 2 (Lisa Foster interview).

[342] USPP Report (Rolla), 7/27/93, at 1.

[343] OIC Doc. No. DC-39-6.

[344] USPP Report (Rolla), 7/27/93, at 1.

[345] 302, 4/7/95, at 3, 5.

[346] Alice Mae Foster 302, 5/2/95, at 3.

> I talked to Vince on 7/19/93, at which time he complained of anorexia and insomnia. He had no GI [gastrointestinal] symptoms. We discussed the possibility of taking Axid or Zantac to help with any ulcer symptoms as he was under a lot of stress. He was concerned about the criticism they were getting and the long hours he was working at the White House. He did feel that he had some mild depression. I started him on Desyrel, 50 mg. He was to start with one at bedtime and move up to three. . . . I received word at 10:20 p.m. on 7/20/93 that he had committed suicide.[347]

Dr. Watkins said that it was unusual, even unprecedented, for Mr. Foster to call him directly.[348] Lisa Foster said that Mr. Foster took one tablet of the antidepressant medication on the night of the 19th.[349]

In short, the OIC cannot set forth a particular reason or set of reasons *why* Mr. Foster committed suicide. The important issue, from the standpoint of the death investigation, is whether Mr. Foster committed suicide. On that issue, the state-of-mind evidence is compelling, and it demonstrates that Mr. Foster was, in fact, distressed or depressed in a manner consistent with suicide. Indeed, the evidence was sufficient for Dr. Berman to conclude that "to a 100% degree of medical certainty, the death of Vincent Foster was a suicide."[350]

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[347] OIC Doc. No. DC-41-2.

[348] 302, 5/16/94, at 2.

[349] 302, 5/9/94, at 13.

[350] Berman Report at 15.

X. SUMMARY OF CONCLUSIONS

To sum up, the OIC has investigated the cause and manner of Mr. Foster's death. To ensure that all relevant issues were fully considered, carefully analyzed, and properly assessed, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman. The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C., for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides. The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, examining the analyses and conclusions of the OIC experts and investigators, and preparing this report.

The autopsy report and the reports of the pathologists retained by the OIC and Mr. Fiske's office demonstrate that the cause of death was a gunshot wound through the back of Mr. Foster's mouth and out the back of his head. The autopsy photographs depict the wound in the back of the head, and the photographs show the trajectory rod through the wound. The evidence, including the photographic evidence, reveals no other trauma or wounds on Mr. Foster's body.

The available evidence points clearly to suicide as the manner of death. That conclusion is based on the evidence gathered and the analyses performed during previous investigations, and the additional evidence gathered and analyses performed during the OIC

investigation, including the evaluations of Dr. Lee, Dr. Blackbourne, Dr. Berman, and the various OIC investigators.

When police and rescue personnel arrived at the scene, they found Mr. Foster dead with a gun in his right hand. That gun, the evidence tends to show, belonged to Mr. Foster. Gunshot residue-like material was observed on Mr. Foster's right hand in a manner consistent both with test firings of the gun and with the gun's cylinder gap. Gunshot residue was found in his mouth. DNA consistent with that of Mr. Foster was found on the gun. Blood was detected on the paper initially used to package the gun. Blood spatters were detected on the lifts from the gun. In addition, lead residue was found on the clothes worn by Mr. Foster when found at the scene. This evidence, taken together, leads to the conclusion that Mr. Foster fired this gun into his mouth. This evidence also leads to the conclusion that this shot was fired while he was wearing the clothes in which he was found. Mr. Foster's thumb was trapped in the trigger guard, and the trigger caused a noticeable indentation on the thumb, demonstrating that the gun remained in his hand after firing.

The police detected no signs of a struggle at the scene, and examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging. Nor does the evidence reveal that Mr. Foster was intoxicated or drugged.

Dr. Lee found gunshot residue in a sample of the soil from the place where Mr. Foster was found. He also found a bone chip containing DNA consistent with that of Mr. Foster in debris from the clothing. Dr. Lee observed blood-like spatter on vegetation in the photographs of the scene. Investigators found a quantity of blood under Mr. Foster's back and head when the body was turned, and Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. In addition, the blood spatters on Mr. Foster's face had not been altered or smudged, contrary to what likely would have occurred had the body been moved and the head wrapped or cleaned. Fort Marcy Park is publicly accessible and traveled; Mr. Foster was discovered in that park in broad daylight; and no one saw Mr. Foster being carried into the park. All of this evidence, taken together, leads to the conclusion that the shot was fired by Mr. Foster where he was found in Fort Marcy Park.

The evidence with respect to state of mind points as well to suicide. Mr. Foster told his sister four days before his death that he was depressed; he cried at dinner with his wife four days before his death; he told his mother a day or two before his death that he was unhappy because work was "a grind"; he was consulting attorneys for legal advice the week before his death; he told several people he was considering resignation; he wrote a note that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport." The day before his death, he contacted a physician and indicated that he was under stress. He was prescribed antidepressant medication and took one tablet that evening.

Dr. Berman concluded that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability."[351] Dr. Berman stated, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically

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[351] Berman Report at 10.

even before this."[352] Dr. Berman concluded that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."[353]

In sum, based on all of the available evidence, which is considerable, the OIC agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

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[352] *Id.* at 9.

[353] *Id.* at 15.

Supreme Court, U.S.
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In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The question presented is:

Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death.

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In the Supreme Court of the United States

No. 02-954

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion of the court of appeals in this case (Pet. App. 4a-43a) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 44a-46a, 47a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. The government's petition for rehearing was denied on August 16, 2002 (Pet. App. 63a-64a). On November 5, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 14, 2002. On December 4, 2002, Justice O'Connor further extended the time to and including December 20, 2002, and the petition was filed on that date. Certiorari was granted on May 5, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

STATEMENT

1. This Freedom of Information Act (FOIA) suit arises from the July 1993 death of Deputy Counsel to the President, Vincent W. Foster, Jr. Foster was found dead in Fort Marcy Park in McLean, Virginia, which is part of the National Park System. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. The Park Police investigation concluded that Foster committed suicide. Pet. App. 5a; see also Press Conf. with Deputy Attorney General Philip Heyman. (Aug. 10, 1993), *reprinted in* 2 *Hearings Relating to Madison Guaranty S&L, and the Whitewater Dev. Corp.—Washington, DC Phase: On Death of Vincent W. Foster, Jr., Before the Senate Comm. on Banking, Housing & Urban Affairs*, 103d Cong., 2d Sess. 1848 (1994) (*Death of Vincent Foster Hearings*). The FBI reached the same conclusion. *Id.* at 1851, 1857, 1860; Pet. App. 5a.

Two independent counsels also investigated the Foster death, and definitively concluded that Foster committed suicide. In January 1994, Attorney General Reno appointed Robert B. Fiske, Jr., as a special counsel under Department of Justice regulations, see 28

C.F.R. Pt. 600, 603.1, with jurisdiction over matters connected with Madison Guaranty Savings and Loan Association and the Whitewater Development Corporation. Because of the possible connection between Foster and Whitewater, Independent Counsel Fiske investigated the cause of Foster's death. See Robert B. Fiske, Jr., *Report of the Independent Counsel: In re Vincent W. Foster, Jr.* (June 30, 1994) (*Fiske Report*), *reprinted in* 1 *Death of Vincent Foster Hearings* 181-373. That investigation included interviews with approximately 125 individuals, review of voluminous documentary and photographic evidence, extensive examination of physical evidence, and analysis by a panel of four nationally renowned forensic pathologists who were afforded "unrestricted access to all available investigative and scientific information and materials regarding the death of Vincent W. Foster, Jr." *Id.* at 2-6 & App. 3. Based on the unanimous conclusion of the panel of pathologists, see *id.* at App. 3, and his consideration of all the other evidence, Mr. Fiske concluded that the "overwhelming weight of the evidence compels the conclusion * * * that Vincent Foster committed suicide." *Id.* at 58; see also *id.* at 6 ("[T]here is no evidence to the contrary. This conclusion is endorsed by all participants in the investigation, including each member of the Pathologist Panel.").

The United States Senate, through its Committee on Banking, Housing, and Urban Affairs, conducted its own inquiry into the Park Police investigation of Foster's death. After assembling nearly 2700 pages of evidence and testimony from individuals involved in the investigation, see 1 & 2 *Death of Vincent Foster Hearings*, *supra*, the Senate Committee issued a 54-page report in which it concluded, without dissent, that "[t]he evidence overwhelmingly supports the conclusion

of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gun shot wound to the upper palate of his mouth." S. Rep. No. 433, 103d Cong., 2d Sess. 4 (1995); see also 1 *Death of Vincent Foster Hearings* 38-39 (statement of Sen. Hatch) ("There is absolutely no credible evidence to contradict the Fiske Report's conclusion that Vincent Foster took his own life and it happened at Fort Marcy Park. There is no credible evidence to the contrary. I suspect conspiracy theorists will always differ with this conclusion and little this Committee does is going to muffle their speculation."). An investigation in the House of Representatives, led by Representative William Clinger, Jr., the Ranking Minority Member of the House Committee on Government Operations, similarly concluded that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993." *Summary Report by William F. Clinger, Jr., Ranking Republican, House Comm. on Gov't Operations, on the Death of White House Deputy Counsel Vincent W. Foster, Jr.* 6 (Aug. 12, 1994) (*Clinger Report*).

Following enactment of the Independent Counsel Reauthorization Act in June 1994, 28 U.S.C. 591 *et seq.*, the Special Division of the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel charged with investigating the Madison Guaranty Savings and Loan matter.[1] As part of that investi-

[1] The Independent Counsel provisions of the Act expired on June 30, 1999, 28 U.S.C. 599, but the Act permits continuation of the Office of Independent Counsel to resolve any pending matters until the Independent Counsel "determines such matters have been completed," *ibid.* The Office has now concluded all of its investigations and is completing tasks necessary to close the office, including transferring its records to the Archivist, 28 U.S.C. 594(k)(1).

gation, Mr. Starr conducted a fresh inquiry into the death of Vincent Foster. See Kenneth W. Starr, *Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Assoc.* (Oct. 1997) (*Starr Report*), *reprinted in* J.A. 97- 212. The Independent Counsel, with the assistance of an expert pathologist, forensic scientists, an experienced suicidologist, and numerous expert homicide investigators, reviewed all of the available forensic, scientific, physical, and documentary evidence. J.A 102-103, 110-115. After a lengthy and thorough investigation, which included convening a grand jury (J.A. 102), Mr. Starr filed a 114-page report that, "based on all of the available evidence, which is considerable, * * * agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993." J.A. 212; see also J.A. 103 ("[T]o a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion.") (quoting Dr. Alan Berman).

2. Respondent Favish (respondent) filed a FOIA request with the Office of Independent Counsel for color copies of the ten death-scene photographs of Foster. J.A. 43-46. The request also sought a large number of other photographs related to the investigation of Foster's death. *Ibid.* When the Office of Independent Counsel declined to release the photographs due to its pending investigation, J.A. 47-48, 51-52, respondent filed suit in the Central District of California.[2] Follow-

[2] FOIA Exemption 7(A) authorizes the withholding of law enforcement records the production of which "could reasonably be expected to interfere with [law] enforcement proceedings," 5 U.S.C. 552(b)(7)(A).

ing publication of the Independent Counsel's report on his investigation into Foster's death, the Office released 118 photographs to respondent. Pet. App. 6a, 48a; J.A. 59, 62-67. The Office continued to assert Exemption 7(C) to withhold the death-scene photographs. J.A. 71-72 (concluding that release of the photographs "would cause Mr. Foster's surviving family members a great deal of anguish well beyond that which they have already suffered, and thus would constitute an unwarranted invasion of their personal privacy").

a. On cross-motions for summary judgment, the district court sustained the government's invocation of Exemption 7(C) with respect to the death-scene photographs. Pet. App. 47a-62a. The court explained that the public interest asserted by respondent—that of "ensuring that the [Office of Independent Counsel] conducted a proper and thorough investigation"—"is lessened because of the exhaustive investigation that has already occurred regarding Foster's death," *id.* at 58a. The court further held that respondent failed to "sufficiently explain[] how the disclosure of these photographs will illuminate any deficiencies of the [Independent Counsel] investigation." *Id.* at 59a. The district court therefore concluded that the family's privacy interest outweighed the public interest in disclosure of the photographs. *Ibid.*[3]

b. A divided court of appeals reversed and remanded. Pet. App. 4a-43a. The court agreed with every other circuit court to address the question that "the personal privacy" protected by Exemption 7(C) "extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at

[3] The district court ordered release of a photograph of Foster's eyeglasses at the death scene, and the Office of Independent Counsel complied with that order. Pet. App. 59a-60a.

13a. With respect to the public interest in disclosure that would be necessary to overcome that privacy interest, however, the Ninth Circuit held that respondent's interest in probing "how the [Office of Independent Counsel] conducted its investigation of Foster's death" sufficed, because respondent sought to examine "what [his] government is up to." *Id.* at 10a-11a. Evidence or knowledge of "misfeasance by the agency," the court declared, is not necessary, regardless of how many "other agencies have engaged in similar investigations" already. *Id.* at 11a. The court remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Id.* at 14a.

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 14a, but in a lengthy dissent disagreed with the majority's analysis of the public interest in disclosure and its remand of the case for further proceedings, *id.* at 14a-43a. Judge Pregerson reasoned that the government's *Vaughn* index[4] was sufficiently detailed to make a remand for *in camera* review unnecessary, *id.* at 18a-22a, and that the "pain and anguish" that respondent concedes the Foster family would suffer, *id.* at 35a, outweighs the public interest in obtaining the photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 38a-42a. Judge Pregerson also noted that, although respondent alleges that the investigation was "grossly incomplete and untrustworthy," *id.* at 38a, he "has made no showing that anyone connected with the

[4] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[Independent Counsel's] investigations—including Mr. Starr—engaged in wrongful conduct, [or] failed in his or her official duties," *ibid.* Finally, like the district court, Judge Pregerson could find no nexus between disclosure of the photographs and advancement of the asserted public interest, because respondent failed to demonstrate that the "photographs at issue will shed any light on the integrity of their investigations, the nature of the [Office of Independent Counsel's] conduct, or the correctness of its conclusions." *Ibid.*

3. a. On remand, the district court ordered release of five of the ten photographs, Pet. App. 44a-46a, including one photograph of a gun in Foster's hand that had been published previously by *Time* magazine, *id.* at 45a; see also 1 C.A. E.R. 170-171.

The government filed a motion for reconsideration, and Foster's widow and sister moved to intervene to oppose disclosure. J.A. 9. Foster's widow, Lisa Foster Moody, submitted a declaration in which she explained that Foster's "death and the manner in which he died totally devastated our family" and that, "[i]f these photographs are released, we will again be thrust in the public eye and forced to endure the pain and invasion of privacy all over again." J.A. 90. She further explained that the family has tried to "deal[] with our grief in private and * * * [t]he privacy we have sought to maintain has been our salvation." J.A. 91. She also described the impact that disclosure of the photographs would have on her and her children: "I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him." *Ibid.* Disclosure of the photographs, she continued, would "cause us no end of pain and sorrow," especially if "my children hav[e] to see pictures of their

dead father on the nightly news, on the Internet and on the supermarket shelves." J.A. 92.

Sheila Foster Anthony, Foster's sister, also submitted a declaration discussing the intrusiveness of the "barrage" of media coverage that has persisted since Foster's death, and how reporters and "[c]onspiracy theorists" have "harassed my grieving family in unbelievably insensitive ways." J.A. 93-94. She explained that the "family was horrified and devastated by the photograph leaked to the press and published on a national television network of Vince's dear dead hand holding the gun he used to kill himself." J.A. 94. She further expressed her "fear" that release of the photographs would result in their publication on the Internet and would "subject my family to more public scrutiny." J.A. 95. "The horror," she continued, "of actually seeing Vince's dead body and bloody face and shirt would undoubtedly cause me extreme mental anguish * * * [and] would only bring more agony to my family." *Ibid.* Anthony concluded by "implor[ing] the Court to do all it can to protect our family, but particularly Vince's children and his 86 year old mother, from further invasion and the distressing events that surely would result from release of these photographs." J.A. 96.

The district court granted the family members' motion to intervene, but declined to alter or amend its ruling. J.A. 10.

b. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. Pet. App. 1a-2a. The court held, however, that one photograph ordered released by the district court—of Foster's body, as seen by looking down from the top of the berm of the slope where his body lay—had

been properly withheld by the Office of Independent Counsel. *Id.* at 2a. The four photographs ordered released include one that shows Foster's right hand holding the gun, two of Foster's right shoulder and the right side of his torso, and one of the top of Foster's head through heavy foliage. *Id.* at 45a. None of the photographs ordered released depicts Foster's face or the bullet wounds. See *id.* at 45a-46a.

Judge Pregerson again dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). Pet. App. 3a.[5]

SUMMARY OF ARGUMENT

Exemption 7(C) of the Freedom of Information Act strikes a calibrated balance between the public's right to understand the operations and activities of government and the privacy interests of individuals in the vast amounts of personal information that are stored in government files. The Ninth Circuit's judgment ordering the public release of law enforcement photographs of Vincent Foster's dead body at the scene of his suicide ignores that balance, by equating the public interest in disclosure with one individual's personal disbelief and distrust of the government.

A. This Court's cases have established that the personal privacy protected by FOIA exceeds constitutional and common-law conceptions and includes personal interests both in avoiding unwanted public attention and emotional disquiet, and in controlling the dissemination of personal information that was provided or collected for a particularized and limited governmental use. The release of photographic or similar records of a loved one's dead body or of that person in the throes

[5] Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. Pet. App. 3a.

of death implicates precisely those types of privacy interests in surviving family members. When the government takes or obtains images of persons either immediately before or after their death, it does so for specific purposes, such as law enforcement, accident investigations, or as an adjunct to military or intelligence operations. There is no well-established tradition of public access to such materials. Quite the contrary, many jurisdictions affirmatively prohibit or restrict public access to such photographs. Furthermore, the government's release of photographs of a loved one's dead body can reasonably be expected to cause substantial emotional upset and disruption of peace of mind for family members, as is powerfully documented by the declarations of Foster's family members. Tradition and culture, as well as the law, have long left to close family members the control over display of the deceased's body. FOIA does not empower any curious individual to trump those family choices.

B. That powerful privacy interest is not offset by any discernible public interest in disclosure of Foster's death-scene photographs. The Ninth Circuit concluded that it was sufficient that respondent articulated a theory of governmental conspiracy or misfeasance that, "if believed," would reveal governmental misconduct of interest to the public. That standard is wrong for three reasons.

First, this case stands as a testament both to the ease with which allegations of governmental misconduct can be leveled and the longevity that they can acquire. Five investigations conducted by officials in the Executive and Legislative Branches, as well as *two* Independent Counsels, have unanimously concluded—without dissent—that Vincent Foster committed suicide. Four of those investigations probed not just Foster's death,

but also the conduct of the Park Police investigation in and of itself. Those investigations, moreover, have considered, addressed, and rejected the theories propounded by respondent. FOIA's carefully crafted protection of personal privacy would be rendered an empty promise if it could be overcome by little more than an idiosyncratic distrust of government or the creative spawning of conspiracy theories by any one FOIA requester. Instead, consistent with the presumption of legitimacy long accorded to government records and official conduct, FOIA requests asserting a public interest only in uncovering hypothesized governmental misconduct must substantiate their allegations with new (not already refuted), credible, and objectively reasonable grounds for believing that misconduct occurred.

Second, even where a FOIA requester makes such a showing, this Court's cases establish that the public interest in disclosure must be evaluated in light of the amount of information already in the public domain. In this case, five expert investigations have resulted in the disclosure of thousands of pages of evidence and analysis and more than 100 photographs associated with the suicide. Dozens of pathology, forensic, and law enforcement experts have asked and answered the questions and theories propounded by respondent, and their conclusions have been unanimous. The test under Exemption 7(C) is not whether there is a slim prospect that release of the photographs would quell respondent's persistent, personal speculation. It is whether the *public* interest would be *significantly* advanced by disclosing these additional, highly intrusive details of Foster's death. In light of all of the information already disclosed and the investigations already undertaken, the contribution that disclosure of the photographs

would make to an informed public is marginal, if not nonexistent.

Finally, the photographs ordered released bear no substantial nexus to the public interest that respondent asserts. They reveal only Foster's death image; they show nothing directly about the Office of Independent Counsel, which did not take the photographs and was not involved in the investigation until months later. Nor do the photographs ordered released, which show Foster's shoulder, arm, and torso, cast any light on whether Foster shot himself in the mouth or neck. Respondent's personal desire to see for himself, in addition to all of the evidence already available to him, what Foster looked like immediately after his suicide cannot be equated with the general public interest in knowing that the government investigations were thorough and accurate in their conclusions. That latter interest, which is the only relevant public interest under Exemption 7(C), has been fully served. Further private probing, which could come only at enormous expense to the surviving family members, is unwarranted.

ARGUMENT

THE OFFICE OF INDEPENDENT COUNSEL PROPERLY WITHHELD PHOTOGRAPHS OF VINCENT FOSTER'S BODY AT HIS DEATH SCENE UNDER EXEMPTION 7(C) OF THE FREEDOM OF INFORMATION ACT

In applying Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C), courts must first determine whether the records at issue were "compiled for law enforcement purposes," 5 U.S.C. 552(b)(7). In this case, there is no dispute that the photographs at issue are law enforcement records. They were taken by law enforcement officials at the

scene of a death for the purpose of investigating the cause of death. See J.A. 87. Accordingly, the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause. *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). Because disclosure of the death-scene photographs would intrude significantly on the privacy of the Foster family without measurably advancing the general public interest in understanding governmental activity, the photographs are exempt from disclosure under FOIA.

A. Disclosure Of The Photographs Could Reasonably Be Expected To Intrude Upon The Surviving Family Members' Privacy

1. *Protecting Against Unwarranted Intrusions On Personal Privacy Under FOIA Has Been A Prime Concern Of Congress*

In enacting the FOIA, 5 U.S.C. 552, Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (quotation marks omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the Act's nine exemptions. *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

Congress was aware, in particular, that vast amounts of personal information about individuals routinely accumulate in government records. See, *e.g.*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book* 32 (Comm. Print 1974) (*1974 Source Book*) (a number of agencies "have great quantities of files containing intimate details about millions of citizens"). As a consequence, the two "vital and deeply held commitments in our democratic system * * * [of] privacy and the right to know[]" could "inevitably impinge one against another." *Attorney General's Memorandum on the Public Information Section of the Admin. Procedure Act* at iii (June 1967) (*1967 Attorney General Mem.*). In response to that problem, "[a]t the same time that a broad philosophy of 'freedom of information'" was enacted into law, Congress sought to "protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 n.9 (1976)); see also S. Rep. No. 221, 98th Cong., 1st Sess. 21 (1983) ("Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals.").

To that end, two of FOIA's nine exemptions are directed specifically to protecting the privacy of personal information in government records. The broadest protection for privacy under the FOIA is provided by Exemption 7(C), which is at issue in the present case. That provision exempts from the government's general duty of disclosure "records or information compiled for

law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

As originally enacted in 1966, Exemption 7 protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Act of July 4, 1966, Pub. L. No. 89-487, § 3(e), 80 Stat. 251. Because courts often construed it as a blanket exemption for all law enforcement records, Congress amended Exemption 7 in 1974 to specify that only certain classes of sensitive law enforcement material should be exempt from disclosure. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). Accordingly, "[a]s amended, Exemption 7 requires the Government to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." *John Doe Agency*, 493 U.S. at 156; see also *FBI* v. *Abramson*, 456 U.S. 615, 622 (1982).

In 1986, Congress significantly broadened the scope of Exemption 7(C) to ensure that the protection of privacy it affords would not be construed in an "overly formalistic way." S. Rep. No. 221, 98th Cong., 1st Sess. 22 (1983).[6] Before the 1986 amendment, the government was required to prove that the invasion of the privacy interest at stake "would" be "unwarranted." The 1986 amendment supplied a more flexible standard.

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[6] Because the 1986 revision was enacted through a floor amendment to the Anti-Drug Abuse Act of 1986, there are no contemporaneous committee reports to consult. However, the 1983 Senate Report on the virtually identical amendments (S. Rep. No. 221, *supra*) has been cited by this Court and others as providing helpful guidance in construing the 1986 amendments. See *Reporters Committee*, 489 U.S. at 777 n.22; *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 4 & nn.6-7 (Dec. 1987).

See *Reporters Committee*, 489 U.S. at 756 n.9. In an effort to ease the government's burden in protecting personal information under Exemption 7(C), Congress replaced the phrase "would constitute an unwarranted invasion of personal privacy" with the more flexible and predictive standard of "could reasonably be expected to constitute" an unwarranted invasion of privacy. *Ibid.*; *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). The change was "designed to make it clear that the courts should apply a common sense approach to this balancing test," and to "eliminate any possibility of an overly literal interpretation" of the exemption. S. Rep. No. 221, *supra*, at 22. That approach was deemed critical because, by their very nature, law enforcement investigations commonly require officials to collect considerable amounts of private information about individuals, whether they are witnesses, victims, or possible suspects. The amendment embodied the judgment of Congress that, although "[n]o one questions the value of an informed citizenry; nor should anyone question the government's obligation to respect the privacy of those same citizens." *Id.* at 3.

With respect to non-law enforcement records, FOIA Exemption 6 allows the government to withhold information contained in "personnel and medical files and similar files" if the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) "is more protective of privacy than Exemption 6" because the former "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,'" while the latter bars only disclosures "that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" *Department of Defense* v. *FLRA*, 510 U.S. 487, 496-497 n.6 (1994). The two exemptions thus

"differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," *id.* at 497.

2. *FOIA's Privacy Protection Extends To Control By Close Family Members Over Sensitive Matters And Personal Decisions Concerning The Death Of A Loved One*

a. *The scope of FOIA's privacy protection*

Exemption 7(C) protects against unwarranted invasions of "personal privacy." 5 U.S.C. 552(b)(7)(C). Nothing in the statutory text limits the privacy protected to that of the subject of the requested record. Indeed, since FOIA's enactment, the privacy exemptions have been understood to "includ[e] members of the family of the person to whom the information pertains." *1967 Attorney General Mem.* 36. Even when Congress narrowed Exemption 7's scope in 1974 by identifying particular categories of information for withholding, the reference to personal privacy in Exemption 7(C) was understood to "protect[] relatives or descendants of" persons under investigation, and to factor into the withholding decision the "possible adverse effects upon [the individual] or his family." *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10 (Feb. 1975); see also *Department of State* v. *Ray*, 502 U.S. 164, 176 (1991) (privacy interest includes embarrassment that disclosure could cause for returned Haitian nationals "or their families"). Congress employed the modifier "personal" not to limit the protection to particular individuals, but to restrict it to natural *persons* rather than corporations or other entities.[7]

[7] See *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602 n.4 (1982) ("[T]here are undoubtedly many Government files which contain information not personal to any particular individual * * *. Information unrelated to any particular person presumably would not satisfy the threshold test" for protection under FOIA's privacy exemptions.); *1974 Source Book* 278; *1967 Attorney General Mem.* 36-37; *Sims* v. *CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

Because FOIA was not intended to afford the general public a right of access to the vast amounts of "information about private citizens that happens to be in the warehouse of the Government," *Reporters Committee*, 489 U.S. at 774 (emphasis omitted), this Court has refused to adopt a "cramped notion of [the] personal privacy" that FOIA protects, *id.* at 763.[8] The Court instead has broadly defined the types of privacy interests protected by Exemptions 6 and 7(C). In *Reporters Committee*, the Court held that criminal history records—"rap sheets"—are exempted from disclosure under Exemption 7(C). *Id.* at 762-780. In so holding, the Court explained that the privacy interests protected by FOIA are more expansive than tort-law or constitutional conceptions of privacy. *Id.* at 762 n.13; see also *Marzen* v. *Department of Health & Human Servs.*, 825 F.2d 1148, 1152 (7th Cir. 1987) ("[T]he privacy interest protected under FOIA extends beyond the common law."). Exemption 7(C) also protects information about an individual that is already in the public record, but that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Reporters Committee*, 489 U.S. at 763-764 (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). The "practical obscurity" of such information and its "hard-to-obtain"

[8] See also *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.").

character creates a FOIA-protected privacy interest against its broad disclosure to the public. *Reporters Committee*, 489 U.S. at 762, 764.[9]

Moreover, "invasion[s]" of privacy that are "unwarranted" under FOIA extend beyond intrusions into the home, physical invasions of the body, disruption of mental solitude, and incursions on other archetypically private realms. Under this Court's cases, privacy includes the right to avoid public embarrassment, harassment, and the unwanted attention of others. In *Reporters Committee*, the Court spoke of a "privacy interest in keeping personal facts away from the public eye," especially matters that otherwise might be "wholly forgotten" due to the passage of time. 489 U.S. at 769. In *Ray*, the Court recognized that disclosure of the identities of Haitian nationals who had unsuccessfully attempted to flee to the United States and were returned to Haiti "could subject them or their families to embarrassment in their social and community relationships," 502 U.S. at 176, and that there existed a "privacy interest in protecting these individuals from any retaliatory action" or even attempted "interview[s]" by third parties that disclosure might bring about, *id.* at 177.

Likewise, in *Rose*, the Court upheld, under FOIA Exemption 6, the redaction of identifying information about third parties and witnesses from case summaries of honors and ethics hearings held by the United States Air Force Academy. Such redactions, the Court rea-

[9] See also *Department of Defense* v. *FLRA*, 510 U.S. at 497 (names and addresses exempt from disclosure); *Washington Post*, 456 U.S. at 600 (FOIA's protection of privacy is not limited to "highly personal" matters; it includes "information about a particular individual that is not intimate," such as "place of birth, date of birth, date of marriage, employment history, and comparable data").

soned, promote "privacy values" by protecting the subjects of the hearings from "embarrassment, perhaps disgrace," 425 U.S. at 376-377, due to the revival of "wholly forgotten" past events, *id.* at 381; see also *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) ("Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.").

Accordingly, FOIA's definition of "personal privacy" extends to (i) personal information about an individual or a close family member that happens to be warehoused in government files, (ii) that was intended for or restricted to the use of particular persons, and (iii) the disclosure of which could reasonably be expected to cause embarrassment, emotional upset or anguish, injury, or unwanted public attention for the individual or family members.[10]

[10] Foster's status at the time of his death as a public official does not affect the privacy interests of his surviving family members for three reasons. First, even if Foster were a "public figure," his children, spouse, siblings, and mother are not, see *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), and their privacy interests in controlling their loved one's death image are not diminished by the deceased's prior occupation. Indeed, arguably his prominence increases the likelihood of harassment and unwanted attention for his family members. See *Fund for Const. Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 865 (D.C. Cir. 1981). Second, even public officials maintain legitimate privacy interests protected by FOIA. See, *e.g.*, *Department of Defense* v. *FLRA*, 510 U.S. at 500-502 (protecting the privacy of civil service employees); *Rose*, 425 U.S. at 381 (acknowledging privacy interests of Air Force Academy graduates who have remained in the military); *New York Times Co.* v. *NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) (recognizing privacy interests of NASA astronauts and their families). Even if public officials' expectations of privacy may be "somewhat diminished," they "do not surrender all rights to personal privacy when they accept a public appointment."

b. *The privacy of surviving family members*

Consistent with this Court's delineation of the scope of FOIA's privacy protection, every court of appeals to address the question, including the court of appeals in this case, see Pet. App. 13a, has held both that the privacy interests of close family members survive the death of an individual who is the subject of a governmental record, and that the family members' privacy interests include controlling the images and sensitive events surrounding a loved one's death.

Tracking the privacy protection from embarrassment, mental distress, and unwanted attention recognized by this Court in *Reporters Committee*, *Ray*, and *Rose*, the lower courts' recognition of survivors' privacy interests in the images and specific details of a loved one's death has relied upon the emotional disquiet and intrusion upon the solitude of grieving families that disclosure would cause. In *New York Times Co.* v. *NASA*, 782 F. Supp. 628 (D.D.C. 1991), the court sustained the withholding under Exemption 6 of an audiotape of the Space Shuttle Challenger astronauts' last words because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death * * * would cause the Challenger families pain," and disclosure to the general public under FOIA would inflict a "disruption of their peace of mind every time a portion of the tape is played within their hearing." *Id.* at 631-632, on remand from *New*

Kimberlin v. *Department of Justice*, 139 F.3d 944, 949 (D.C. Cir.), cert. denied, 525 U.S. 891 (1998) (quoting *Quinon* v. *FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996)); see also *Lesar* v. *Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980). Third, respondent has never asserted that disclosure of the photographs would cast relevant light on Foster's performance of his own duties as Deputy Counsel to the President. See Pet. App. 57a.

York Times Co. v. *NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (recognizing continuing privacy interests of astronauts and their families). In *Katz* v. *National Archives & Records Admin.*, 862 F. Supp. 476 (D.D.C. 1994), aff'd on other grounds, 68 F.3d 1438 (D.C. Cir. 1995), the court held that autopsy X-rays and similar photographs of President Kennedy were exempt from disclosure because their release would cause "additional anguish" to the surviving family, *id.* at 485. See also *Lesar* v. *Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980) (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding "annoyance or harassment"). Where family members have religious or cultural objections to the public display of the deceased, disclosure also could inflict a profound spiritual and psychological intrusion on the survivors. See, *e.g.*, Maurice Lamm, *The Jewish Way in Death and Mourning* 29-37 (2000).

Indeed, with respect to the very photographs at issue here, the D.C. Circuit held that Exemption 7(C)'s privacy protection embraces "the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence," observing that "there seems nothing unnatural in saying that the interest asserted against it by spouse, parents, and children of the deceased is one of privacy." *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).[11] As the Ninth Circuit noted in this case, there is "a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one," and "[t]o violate that memory is to

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[11] The D.C. Circuit case involved a request for black-and-white copies of the photographs, while here respondent seeks the "highest quality" color copies of the photographs. J.A. 45; Pet. App. 22a.

invade the personality of the survivor * * * [and] an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Pet. App. 13a. In that same vein, Independent Counsel Starr declined to include death-scene or autopsy photographs as part of his report "based on traditional privacy considerations." *Starr Report*, J.A. 116.[12]

While the privacy protection afforded by FOIA is broader than common-law conceptions of privacy, see *Reporters Committee*, 489 U.S. at 762 n.13, it is noteworthy that several States, under their common law, have recognized a similar right of survivor privacy in the images and other records surrounding the death of a loved one. See, *e.g.*, *Campus Comm., Inc.* v. *Earnhardt*, 821 So. 2d 388, 402 (Fla. Dist. Ct. App. 2002) ("[P]ublication of the nude and dissected body of Mr.

[12] See also *Campbell* v. *Department of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) ("family-related privacy expectations survive death"); *Bowen* v. *FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (autopsy reports exempt under FOIA where disclosure would constitute a clearly unwarranted invasion of personal privacy); *Marzen*, 825 F.2d at 1152, 1154 (family has privacy interest in medical records pertaining to "circumstances surrounding the life and death of Infant Doe," because their disclosure would reveal "the intimate details connected with the family's ordeal"); *L & C Marine Transp., Ltd.* v. *United States*, 740 F.2d 919, 923 (11th Cir. 1984) (Exemption 7(C) protects "information about an individual which he could reasonably assert an option to withhold from the public at large because of * * * its possible adverse effects upon himself or his family.") (quoting *Attorney General's Memorandum on the 1974 Amendments to FOIA, reprinted in* Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 Source Book* 520 (Comm. Print 1975); *Coleman* v. *FBI*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (autopsy reports and photographs of the deceased victim are exempt from disclosure under Exemption 7(C) based upon "the privacy interests of the victim's family").

Earnhardt would cause his wife and children pain and sorrow beyond the poor power of our ability to express in words."), review denied, No. SC02-1635 (Fla. July 1, 2003); *Earnhardt* v. *Volusia County*, No. 2001-30373-CICI, 2001 WL 992068, at *3 (Fla. Cir. Ct. July 10, 2001) ("The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members."; "[E]xamination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members."); *Reid* v. *Pierce County Med. Examiner's Office*, 961 P.2d 333, 338-341 (Wash. 1998) (immediate relatives have privacy interest in autopsy photographs because "[w]e fail to see how autopsy photographs of the Plaintiffs' deceased relatives do not constitute intimate details of the Plaintiffs' lives or are not facts Plaintiffs do not wish exposed before the public gaze"); *McCambridge* v. *City of Little Rock*, 766 S.W.2d 909, 915 (Ark. 1989) (recognizing valid privacy interest of mother of murder victim in crime-scene photographs, but finding it outweighed by a competing public interest); *Douglas* v. *Stokes*, 149 S.W. 849 (Ky. 1912) (recognizing parents' privacy-like interest in photographs of stillborn conjoined twins).[13]

[13] As the D.C. Circuit explained in rejecting a request for the same death-scene photographs of Vincent Foster, to understand the emotional intrusion on family members' traditional solitude in the burial and grieving process, "[o]ne has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos." *Accuracy in Media*, 194 F.3d at 123. See also A. Scott Berg, *Lindbergh* 273 (1998). Websites continue to display photo-

Consistent with that view, there is no broadly recognized tradition in the United States of public access to autopsy or crime-scene photographs or similar depictions of individuals immediately prior to or in the throes of their death. See, *e.g.*, *Comaroto* v. *Pierce County Med. Examiner's Office*, 43 P.3d 539 (Wash. Ct. App. 2002) (convicted child molester denied access to his victim's suicide note); *Bodelson* v. *Denver Pub. Co.*, 5 P.3d 373 (Colo. Ct. App. 2000) (restrictions on public inspection and disclosure of autopsy reports, where disclosure would harm privacy interests of family members of victims of Columbine school shooting); *Shuttleworth* v. *City of Camden*, 610 A.2d 903 (N.J. Super. Ct. 1992) (unlike autopsy reports, autopsy photographs are not public records and thus are not subject to release under state "Right to Know" law; instead, they are subject to possible release under the common law, which balances the parties' interests), certif. denied, 627 A.2d 1135 (N.J. 1992); *Globe Newspaper Co.* v. *Chief Med. Examiner*, 533 N.E.2d 1356 (Mass. 1989) (autopsy reports exempt from disclosure); *Herald Co.* v. *Murray*, 136 A.D.2d 954 (N.Y. App. Div. 1988) (same); *Galvin* v. *Freedom of Info. Comm'n*, 518 A.2d 64, 71 (Conn. 1986) (autopsy reports exempted from state freedom of information law, in part because they "could contain information which, if disclosed, might cause embarrassment and unwanted public attention to the relatives of the deceased").[14]

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graphs of the murdered child 70 years after his death. See, *e.g.*, http://www.lindberghkidnappinghoax.com/body.html.

[14] Many States have near-absolute exemptions from their freedom of information laws, or similar statutory prohibitions, that speak directly to the release of autopsy reports in full, or autopsy photographs specifically. See Alaska Stat. § 12.65.020 (Michie 2002); Del. Code Ann. title 29, § 10002(d)(15) (1997) (absolute prohibition on disclosure of records in custody of medical examiner);

Those cases and laws grow out of long-established cultural traditions acknowledging familial control over the body and image of the deceased. Few events in life are more profoundly intimate and personal than grieving over and coming to terms with the loss of a loved one. American tradition respects the privacy of the event by affording close family members the right

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Ga. Code Ann. § 45-16-27(d) (2002) (prohibiting release of autopsy photographs without written release of next-of-kin); Iowa Code Ann. § 22.7(41) (West 2001); La. Rev. Stat. Ann. § 44:19 (West Supp. 2003) (public right of inspection, but no right to reproduce); Me. Rev. Stat. Ann., title 22, § 3022(8) (West Supp. 2002); Mass. Gen. Laws. ch. 38, § 2, para. 8 (2003); Minn. Stat. § 13.83 (2002) (providing for disclosure of only enumerated categories of data on deceased individuals, not including photographs); 82-12 Op. Nev. Atty. Gen. (1982); N.H. Rev. Stat. Ann. § 611-A:8(IV) (2002); 2003 N.D. Laws 384; Okla. Stat. title 51, § 24A.5(1)(d) (2002); Or. Rev. Stat. § 146.035(5) (2001); R.I. Gen. Laws §§ 23-3-1(11), 23-3-23(a) (2002) (barring inspection or disclosure of records concerning "death" and "data related [there]to," unless authorized); S.C. Code Ann. § 17-5-535(A) (Law. Co-op. Supp. 2002) (restricting use of autopsy photographs); Tex. Crim. P. Code Ann. § 49.25(11) (West 2003); Utah Code Ann. § 26-4-17(4) (2003); Wash. Rev. Code § 68.50.105 (1997).

Several other States require a court order based upon a showing of good cause, or a similarly heightened showing, to release such material. See Cal. Civ. Proc. Code § 129 (West 1998); Fla. Stat. Ann. § 406.135 (West 2002) (exempting autopsy photographs and videotapes from state freedom of information law and requiring consideration by a court of the "seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available"); Ind. Code Ann. § 36-2-14-10 (Michie 2003) (requiring deference to privacy interests); N.Y. County Law § 677(3)(b) (McKinney 2003); W. Va. Code § 61-12-10 (2003). But see *Swickard* v. *Wayne County Med. Examiner*, 475 N.W.2d 304, 310 (Mich. 1991) (autopsy report of judge who committed suicide ordered released because family members only have a protected privacy right where "the disclosed information [would] be highly offensive to a reasonable person and of no legitimate concern to the public").

to decide, consistent with their own religious and moral preferences and any views expressed beforehand by the deceased, whether a loved one's body will be publicly viewed or not and whether funeral services or disposition of the remains will be public or private.[15] Similarly, the bodies of individuals who die in public places are routinely draped to prevent trauma to family members and unwarranted public exposure. In the case at hand, Foster's widow chose not to open her husband's casket to view him and further decided to have the casket remain closed throughout the funereal process, for profoundly personal reasons associated with her desire to preserve her memories of her husband in life. J.A. 91. FOIA was never intended to wrest control of that decision away from family mem-

[15] See Restatement (Second) of Torts § 868 (1979) (one who "prevents [the] proper interment or cremation [of a corpse] is subject to liability to a member of the family of the deceased who is entitled to disposition of the body"); *Larson* v. *Chase*, 50 N.W. 238, 240 (Minn. 1891) (recognizing the wrong inflicted on survivors by "indignity to the dead"); see also, *e.g.*, *Whitehair* v. *Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W. Va. 1985) ("The quasi-property rights of the survivors include the right to custody of the body; * * * to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference."); *Bauer* v. *North Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 243 (Ga. Ct. App. 1999) ("[I]n order to respect 'those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes,' * * * this Court has consistently found that a decedent's next of kin has a personal, quasi-property right in his or her corpse to ensure its proper handling and burial.") (quoting *Louisville & N.R. Co.* v. *Wilson*, 51 S.E. 24 (Ga. 1905)); *In re Estate of Medlen*, 677 N.E.2d 33, 35-36 (Ill. App. Ct. 1997) ("The nearest relatives of the deceased have a quasi-property right in the body; this right arises out of their duty to bury the dead."); cf. *Right to Publicize or Commercially Exploit Deceased Person's Name or Likeness as Inheritable*, 10 A.L.R. 4th 1193 (1981).

bers and into the hands of any curious member of the public.

The need for such privacy protection is crucial in modern times. Whether in the performance of law enforcement functions, the administration of aviation safety, the execution of military operations, or the exploration of outer space, federal agencies not infrequently come into possession of photographs, videotapes, audiotapes, and other records of dead and dying individuals, the public disclosure of which would cause unquestionable pain and anguish for surviving family members. Examples include the videotaped murder of Wall Street Journal reporter Daniel Pearl, the cockpit audiotape of United Airlines Flight 93 that crashed in Pennsylvania on September 11, 2001, videotapes and photographs of soldiers killed in Iraq, photographs and videotapes of the remains of John F. Kennedy, Jr., and records detailing the remains of the Space Shuttle Columbia and Space Shuttle Challenger astronauts.

Furthermore, because withholding cannot be predicated on the identity of the requester, see *Reporters Committee*, 489 U.S. at 771, it is the privacy interest of surviving family members that allows the government to deny requests by child molesters, rapists, murderers, and other violent felons for photographs and other records of their deceased victims.[16] Due to the existence of websites that specialize in displaying images of dead bodies or that focus on high-profile deaths, the profound intrusion that a FOIA disclosure could inflict

[16] See, *e.g.*, *Rapist's Request for Photos Prompts Bill*, Associated Press, May 29, 2003 (convicted rapist obtained investigative photographs of his victim's genitals), available at http://www.heraldonline.com/24hour/nation/story/902243p6283580c.html; *Comaroto*, 43 P.3d at 542-544 (convicted child molester denied access to his victim's suicide note). The federal government has received comparable FOIA requests from convicts for many years.

on the private grieving process of survivors has become, in contemporary times, boundless.[17] Indeed, in declining to publicize Foster's death-scene photographs, Independent Counsel Starr noted that the "potential for misuse and exploitation of such photographs is both substantial and obvious." *Starr Report*, J.A. 116.

Established tradition and judicial practice thus demonstrate that, like the rap sheets at issue in *Re-*

[17] See, *e.g.*, *Earnhardt*, 2001 WL 992068, at *3 (listing some websites); http://deathgallery.com (broad collection of pictures ranging from World Trade Center victims, to American soldiers, to celebrities); http://www.drudgereport.com/md323.htm (pictures of American soldiers killed in Iraq); http://whyaretheydead.net/lisa_mcpherson/autopsy/ (pictures of individual who died while in care of the Church of Scientology); http://www.bobaugust.com/photo.htm (Nicole Brown Simpson crime-scene photograph); http://www.jfklancer.com/aphotos.html (purported autopsy photographs of President Kennedy's body); http://www.finda death.com (includes crime-scene photographs of Jeffrey Dahmer's victims). Because websites of this character are sometimes dismantled and reestablished under new names, the URLs may change during the pendency of this case. The fact of such websites' existence will not. See 2001 Fla. Laws ch. 2001-1, § 2 (legislative findings that "the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury"); cf. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 211 (1890) (the law's protection of privacy must recognize technological evolution in such matters as "photographic art"). While respondent's website is not similarly rife with such grotesque displays, the existence of his website, a portion of which is dedicated to the Foster investigation and already displays a number of photographs from the investigation, enhances the risk that the photographs at issue here will be displayed on the Internet. See http://www.allanfavish.com. The photographs that already have been released have been placed on the Internet by others as well. See http://www.fbi cover-up.com.

porters Committee, death-scene photographs and other images of the deceased and dying in the possession of the government are "not freely available to the public" and, instead, are "intended for or restricted to the use of a particular person or group or class of persons," giving affected family members a FOIA-protected privacy interest in restricting "the degree of dissemination." 489 U.S. at 763-764. Also like the hearing summaries at issue in *Rose* and the rap sheets at issue in *Reporters Committee*, the "passage of time" since Foster's death would exacerbate the intrusiveness of releasing the photographs. *Id.* at 763; see also J.A. 70 ("It was determined that the privacy interests are as strong—if not stronger—now than when the records were created."); cf. *Bast* v. *Department of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("[R]enewed publicity brings with it a renewed invasion of privacy."). Disclosure of such records would inflict the same type of profound emotional invasion and unwanted public attention that this Court has held triggers protection under Exemptions 6 and 7(C). Thus, the Foster family's privacy interest in these photographs is compelling.[18]

[18] In his own petition for a writ of certiorari, respondent has sought this Court's review of the question whether "a deceased's surviving family members [have] a privacy interest under the FOIA in photographs of the deceased's body, when those photographs do not contain any information about those family members." 02-409 Pet. i, *Favish* v. *Office of Indep. Counsel.* A separate petition for writ of certiorari filed by the Foster family members, who are respondents supporting petitioner in this case, also presents a question about the scope of survivor privacy protection under FOIA. 02-599 Pet. i, *Anthony* v. *Favish.* At the same time that the government asked the Court to hold the government's petition in this case pending decision in *Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives* v. *City of Chicago*, 123 S. Ct. 1352 (2003), the United States opposed

B. Release Of The Photographs Of Foster's Body At The Scene Of His Death Would Not Significantly Advance The General Public Interest In Understanding Governmental Activity

Balanced against that grave intrusion on family members' privacy, disclosure of the photographs of Foster's body at the scene of his death would not significantly advance any public interest that is cognizable under FOIA. In analyzing the public interest side of the Exemption 7(C) balance, the Court must consider the extent to which disclosure of the requested documents would "contribute *significantly* to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *Department of Defense* v. *FLRA*, 510 U.S. at 497; see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). The requester bears the burden of "identify[ing] with reasonable specificity the public interest that would be served by release." *Hale* v. *Department of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), vacated and remanded on other grounds, 509 U.S. 918, reinstating judgment in relevant part, 2 F.3d 1055, 1057 (10th Cir. 1993); *King* v.

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certiorari on both of those questions, due to the absence of any circuit conflict. See 02-954 Pet. 7; 02-409 U.S. Br. in Opp. 5-7; 02-599 U.S. Br. in Opp. 5-7. This Court is now holding both respondent's and the Foster family's petitions. Because of those pending petitions and because an understanding of the privacy interest at issue helps set the groundwork for analysis of the public interest prong of the Exemption 7(C) analysis, the United States has addressed the survivor privacy issue in this brief. As this case has proceeded solely as a survivor privacy claim, there is no occasion for the Court to decide under what other circumstances privacy interests (whether of the deceased or others) may survive postmortem. Cf. *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998).

Department of Justice, 830 F.2d 210, 234 (D.C. Cir. 1987). The requester, moreover, must demonstrate more than just a general public interest in the subject matter of the request. He must show that there is a public interest in the "*specific* information being withheld." *Senate of the Commonwealth of Puerto Rico* v. *Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R. B. Ginsburg, J.). That is because, when a FOIA request "seeks no 'official information' about a Government agency, but merely [seeks] records that the Government happens to be storing," then "the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *Reporters Committee*, 489 U.S. at 780.

Disclosure of the photographs at issue here would not significantly, or even discernibly, advance any relevant public interest, for three reasons. There is no public interest cognizable under FOIA in investigating unsubstantiated and repeatedly refuted allegations of governmental misconduct; the voluminous disclosures of information already made by the government satisfy any public interest in probing the government's investigation of Foster's death; and, in any event, the photographs ordered released lack any substantial nexus to the public interest that respondent asserts.

1. *There Is No General Public Interest In Further Probing Unsubstantiated Or Already Refuted Allegations Of Governmental Misconduct*

Respondent has asserted a public interest in uncovering deficiencies in the Independent Counsel's investigation into Foster's death. Pet. App. 10a. In particular, respondent asserts that he needs the photographs to pursue personally his own allegations of a government-wide conspiracy to cover up the alleged murder of Foster. See generally Br. in Opp. 6-17. The

court of appeals declared that respondent's allegations and speculation of "misfeasance by the agency" amounted to a cognizable public interest under FOIA that was sufficient to outweigh the family's privacy interests, because respondent sought to examine "what [his] government is up to." Pet. App. 10a-11a. The Ninth Circuit's approach conflicts with this Court's precedent and accords insufficient protection to the privacy interests of the vast number of individuals whose personal information is stored in government files.[19]

In *Ray*, this Court held that unsubstantiated allegations of governmental misconduct in monitoring the treatment of returned Haitians would not suffice to overcome privacy interests under FOIA:

> We are also unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord Government records and official conduct a presumption of legitimacy. If a totally unsupported suggestion that the interest in finding out whether Government

[19] Other courts of appeals have required a more substantial showing by FOIA requesters alleging governmental misfeasance. See *Neely* v. *FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest is "negligible" in the absence of a "compelling allegation of agency corruption or illegality"); *Accuracy in Media*, 194 F.3d at 124 (compelling evidence) (following *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991)); *Manna* v. *Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.) ("proof of misconduct" necessary), cert. denied, 516 U.S. 975 (1995); *KTVY-TV* v. *United States*, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" by government is insufficient to outweigh privacy concerns); *Senate of Puerto Rico*, 823 F.2d at 588 (a "general interest in getting to the bottom of" an alleged murder conspiracy is "not in itself sufficient to outweigh the privacy concerns").

> agents have been telling the truth justified disclosure of private materials, Government agents would have no defense against requests for production of private information.

502 U.S. at 179.[20]

This case is precisely what *Ray* warned against. Respondent wants the photographs of Foster at the scene of his death to satisfy himself that Foster was not murdered or to prove that he was. But six pathologists and numerous forensic scientists, law enforcement investigators (not only from the Park Police and the FBI, but also those retained by the Office of Independent Counsel), a committee of the United States Senate, Members of the House of Representatives, and two Independent Counsels already have studied the matter at length and have *unanimously* concluded that Foster committed suicide. And detailed reports of those investigations, explaining their conclusions, already have been released to the public.

Respondent's personal interest in the "blowback" and "backspatter" of blood and other morbid matters (see, *e.g.*, Br. in Opp. 7-15) are all fully and comprehensively addressed in those prior investigations by persons who (unlike respondent) are trained experts in pathology and the forensics of murder and suicide. See, *e.g.*, J.A. 111 (retention of expert in bloodspatter). As the district court noted, moreover, each subsequent investigation was undertaken for the express purpose of addressing and resolving doubts that had been posited

[20] See also *Silets* v. *Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc) ("If we were to require only an assertion of bad faith as opposed to evidence of bad faith, we would send a signal flare to all future litigants to make certain to allege Government misconduct no matter how unsupported the allegation."), cert. denied, 505 U.S. 1204 (1992).

both about Foster's death and the predecessor inquiries. 3/9/98 Tr. 10 ("[T]here were just literally scores of people out there trying to prove your points; namely, something was amiss here, something was rotten, and none of them did."); *id.* at 6-7 ("[A]ll [the different investigators] were driven to find a negative aspect of things, not just Mr. Foster dispatching himself. And despite their demonstrated inclination, they didn't come up with anything.").[21] The pictures that

[21] Compare Br. in Opp. 7 (questioning whether gun would have remained in Foster's hand if he shot himself), with *Starr Report*, J.A. 141-143 (gun shot residue and indentations on thumb both prove that Foster fired the gun and explain why the gun remained in his hand), *Fiske Report* 34, 50 (same); compare Br. in Opp. 7 (questioning blood spatter patterns), with *Starr Report*, J.A. 146-148 (analyzing blood spatter patterns and finding them inconsistent with any theory that the body was moved); compare Br. in Opp. 9 (questioning blood spot on Foster's neck), with *Starr Report*, J.A. 133-134 & n.77, 163-164 & n.188 (finding no evidence of neck wound, refuting contrary allegations, and further noting that House and Senate inquiries both probed and rejected the neck-wound theory, as did all six persons attending the autopsy), and *Fiske Report* 33 n.* (same); compare Br. in Opp. 12 (questioning blood drainage patterns and blood transfer stain on Foster's face), with *Starr Report*, J.A. 162-168 (explaining blood flow pattern and transfer stain); compare Br. in Opp. 22 (questioning alleged absence of blood spatter on vegetation), with *Starr Report*, J.A. 158 (finding blood spatter on vegetation); compare Br. in Opp. 23 (questioning gun identification), with *Starr Report*, J.A. 180- 184 (explaining basis for concluding that the gun was Foster's); compare Br. in Opp. 23-24 (questioning whether Foster's body was dragged), with *Starr Report*, J.A. 151 (no evidence of dragging); compare Br. in Opp. 22 (discussing witness who claimed to see no gun in Foster's hand), with *Starr Report*, J.A. 177-179, 1 *Death of Vincent Foster Hearings* 391 (Officer John Rolla), and 2 *id.* at 1587 (Officer Renee Apt) (all: discussing limitations on witness's vantage point, due to severe slope of hill and heavy foliage), and *Fiske Report* 30 (witness acknowledges that "because of his position at the top of the berm and the heavy foliage, there could have been a gun in the man's hand that he did not see"). The Senate Report

respondent wants to see to confirm or dispel his own doubts were fully examined by numerous investigators, without a single individual determining that they evidenced a murder. The deviations in preliminary observations and other questions that respondent raises were all probed and were all resolved to the satisfaction of expert investigators.[22] And all of those investigations came *unequivocally* to the same conclusion: Vincent Foster committed suicide.

The conduct of those investigations by the Park Police, the FBI, the Senate Committee, Members of the House of Representatives, Independent Counsel Fiske, and Independent Counsel Starr—and the integrity of their unanimous outcomes—are entitled to a presumption of legitimacy and regularity. *Ray*, 502 U.S. 179. Under this Court's cases, that presumption can be overcome only by "clear evidence" of governmental

and the Report by Rep. Clinger also expressly address and refute many of respondent's theories. See *Clinger Report* 3-6; S. Rep. No. 433, *supra*, at 9-35.

[22] For example, respondent continues to rely on the tentative observation of one paramedic that he saw what "appeared to be a bullet wound" on Foster's neck. Br. in Opp. 8. Not only has that paramedic long since recanted his initial impression, *Starr Report*, J.A. 133-134 n.77, but, as the D.C. Circuit observed, "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or independent counsel inquiries got anything wrong regarding Foster's wounds." *Accuracy in Media*, 194 F.3d at 124. Indeed, had all of the hundreds of officials and experts involved in every stage of each of the five investigations expressed perfectly harmonized observations and assessments, respondent might have pointed to that wholly unnatural cohesion as evidence of a coordinated and well-rehearsed coverup. FOIA's protection of individual privacy ought not be sacrificed to such win-win conceptions of the public interest.

wrongdoing. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *United States* v. *Nix*, 189 U.S. 199, 206 (1903); *Bank of the United States* v. *Dandridge*, 25 U.S. 64, 69-70 (1827) (the law "presumes that every man, in his private and official character, does his duty, until the contrary is proved").

Within the framework of FOIA, that standard requires a FOIA requester to identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure. Requiring such a showing performs the important function of differentiating between a personal insistence on individually examining every detail of every stage of a governmental investigation, and the general public interest in ensuring that deaths are properly and reasonably—not obsessively—investigated. Such a distinction is critical because the interests of "someone who has spent many years studying every aspect of [a governmental] investigation in great detail * * * and the public interest are not necessarily identical." *Stone* v. *FBI*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) (withholding information pertaining to the investigation of Robert F. Kennedy's assassination), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). After all, "the same bit of new information considered significant by zealous students of the * * * investigation [c]ould be nothing more than minutiae of little or no value in terms of the public interest." *Ibid.*

It is important to remember, though, that a showing of clear evidence is not needed for every or even most FOIA requests. It need be made only when (i) a FOIA request triggers one of the privacy exemptions, which

entails consideration of the countervailing public interest, and (ii) the public interest asserted is an interest in exposing alleged missteps by governmental actors in the presumptively proper execution of their duties. In that context, such a showing is needed to effectuate a "workable balance," *John Doe Corp*, 493 U.S. at 157, between the public's right of access to governmental records when necessary to know "what the Government is up to," *Reporters Committee*, 489 U.S. at 780, and the "equally important rights of privacy with respect to certain information in Government files," S. Rep. No. 813, *supra*, at 3.[23]

Application of that standard requires reversal of the Ninth Circuit's judgment. In the face of investigations of a death that are among the most thorough in American history, the Ninth Circuit concluded that the results of those five presumptively proper investigations were irrelevant to assessing the public interest. Pet. App. 11a. Rather than require clear evidence of governmental misconduct by the Office of Independent Counsel (or any other investigating entity), the Ninth Circuit concluded that third parties' privacy interests can be overcome by any FOIA requester armed with a theory that, "if believed, would justify *his* doubts." *Ibid* (emphasis added). But Exemption 7(C) required the court of appeals to balance the intrusion into the Foster family's privacy against the "*public* interest in [the photographs'] release," *Reporters Committee*, 489 U.S. at 762 (emphasis added), not respondent's "highly-specialized interests" and "great personal stake in gain-

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[23] *Reporters Committee* establishes that, when FOIA requests seek law enforcement records that contain personal information about individuals and that provide little or no official information about a federal agency, courts may adopt categorical rules, like the "clear evidence" standard. 489 U.S. at 776-780.

ing access to that information," *Stone*, 727 F. Supp. at 667 n.4; see also *Julian*, 486 U.S. at 17 (Scalia, J., dissenting) ("FOIA is not meant to provide documents to particular individuals who have special entitlement to them, but rather to inform the *public* about agency action."). In the absence of new (not repeatedly refuted), reliable, and objectively reasonable evidence of a governmental conspiracy or gross incompetence by all five investigating entities, the public interest in probing Foster's death and receiving a full report of those investigations has been thoroughly satisfied.

In support of its contrary approach, the court of appeals invoked "famous cases" in history that "generate controversy, suspicion, and the desire to second guess the authorities," and concluded that FOIA "establishes a right to look, a right to speculate and argue again." Pet. App. 11a. But this case is not about respondent's right to persist in his own beliefs or to "speculate and argue." *Ibid.* It is about whether FOIA allows respondent to feed his curiosity with personal information the disclosure of which would inflict anguish on other private individuals. Nor is this case about whether the "authorities" should be *second*-guessed. It is about whether, given the five prior investigations, the general public has an interest in a *sixth* guess by respondent. This Court has answered that question: "Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Ray*, 502 U.S. at 179.[24]

In short, contrary to the Ninth Circuit's supposition, FOIA does not afford members of the public a single-minded "right to look" (Pet. App. 11a) at all information

[24] As the D.C. Circuit concluded, the "likelihood that the photos contradict the statements of all [prior] investigating agencies seems remote." *Accuracy in Media*, 194 F.3d at 124.

about individuals in governmental records. Quite the contrary, whenever an individual's interest in "look[ing]" has run up against the privacy interests of third parties, "none of [this Court's] cases construing the FOIA ha[s] * * * found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Reporters Committee*, 489 U.S. at 774-775. The Ninth Circuit's approach fails to account for the practical reality that allegations of governmental misconduct are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998). Indeed, some FOIA requesters have an unlimited capacity to see new indicia of governmental conspiracy or coverup at every turn. Simply asking, as the court of appeals did here, whether such speculation and suspicions, "if believed," would suggest governmental misconduct—which, by definition, they would—would transform FOIA's "workable balance" into an easily circumvented pleading requirement.

2. The Public Interest In Probing Foster's Death Has Been Satisfied By The Voluminous Disclosures Of Information Already Made By The Government

Even if the Court were to conclude that there is some remaining public interest in further probing Foster's death, the court of appeals erred in ordering release of the photographs because their disclosure would not significantly advance that public interest or otherwise reveal the operations or activities of the Office of Independent Counsel or other governmental actors.

a. In the first place, the public interest in disclosure of the specific information sought must be measured against the amount of information that is already in the public domain. In *Ray*, this Court sustained the government's withholding on privacy grounds of the identi-

ties of repatriated Haitian refugees who had been interviewed by the State Department, reasoning that the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178.[25] By giving no weight to the enormous volume of information already released by the government, the Ninth Circuit found the public interest requirement to be satisfied by information the disclosure of which could contribute only marginally, if at all, to public understanding.

In this instance, the government has already publicly disclosed Foster's autopsy report; diagrams and sketches of his body, head, and brain from the autopsy; details about his blood tests, the medication he was taking, and information about the state of his stomach

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[25] Other courts of appeals likewise have discounted the public interest in further disclosures based on the amount of information already in the public domain. See *Halloran*, 874 F.2d at 324 & n.13 (the public interest "in learning about the nature, scope, and results of the [Veterans' Administration]'s investigation of, and its relationship with, one of its contractors * * * has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned."); *id.* at n.13; *Marzen*, 825 F.2d at 1153-1154 ("While it is true that the circumstances surrounding the life and death of Infant Doe are of substantial public interest, release of the intimate details contained in the medical records would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report, are already in the public domain."); *Bast*, 665 F.2d at 1255 ("While these are important public interests, we note that they have been served to a large extent by the substantial release of information already made in this case. Thus, it is the incremental advantage to the public of releasing the undisclosed portions of the twelve documents which must be weighed against the invasion of personal privacy."); *Stone*, 727 F. Supp. at 666.

contents; more than 100 pictures of the gun Foster used and other images from the death scene (such as Foster's car); descriptions and photographs of the contents of Foster's car; countless descriptions of the body by witnesses and investigating officials; a number of analyses of his psychological state; the results of laboratory analyses of the gun, DNA, blood found at the scene, gunshot residue, and Foster's clothes and eyeglasses; the depositions and interviews of and communications with countless witnesses, officials, family members, and friends relevant to the investigation; the contents of a note Foster wrote shortly before his death; and detailed descriptions of Foster's activities and behavior in the days leading up to his death, down to the contents of his last lunch. Significantly, moreover, the Park Police's descriptions of the contents of the photographs respondent seeks have been released. 2 *Death of Vincent Foster Hearings* 2112. Independent Counsel Starr published a 114-page report, with a 25-page appendix. See J.A. 97-212; 1 C.A. R.E. 248-273. Independent Counsel Fiske published a 58-page report with 138 pages of appendices. See *Fiske Report*, *supra*. The Senate published two volumes—amounting to 2700 pages—of evidence and testimony from individuals involved in the investigation, see 1 & 2 *Death of Vincent Foster Hearings*, *supra*, and issued its own 54-page report, S. Rep. No. 433, *supra*. Representative Clinger filed an eight-page report on behalf of the minority members of the House of Representatives' Government Operations Committee.

In short, the records already released "reveal the entire course of the investigation and the facts it uncovered." *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981) (per curiam), cert. denied, 456 U.S. 960 (1982). The released materials have provided ample opportun-

ity for respondent to evaluate and critique the government's conduct. The qualitatively distinct injury to Foster's family that public release of the pictures of his dead body would inflict thus is not outweighed by any measurable, let alone significant, contribution to public understanding or public debate. "[A]ny public interest in pursuing the completeness and adequacy of the investigation beyond this point [is] minimal in the extreme." *Ibid.*

Furthermore, only an artificial and wooden conception of the public interest would *always* weigh in favor of more disclosure. See *Fund for Const. Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 865 n.22 (D.C. Cir. 1981). The more realistic assessment is that, in light of the numerous and lengthy investigations that already have taken place, the vast amount of detailed personal information that already has been disclosed, and society's (not just the family's) interest in repose a decade after Foster's death, the public at large would not consider its interests to be well served by having its government serve as the instrument for reopening the Foster family's wounds.

b. FOIA's "central purpose" is to inform the citizenry about "what their government is up to," and to "ensure that the Government's activities [are] opened to the sharp eye of public scrutiny." *Reporters Committee*, 489 U.S. at 773-774; see also *Department of Defense* v. *FLRA*, 510 U.S. at 497 (FOIA's purpose is to "'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'").

The crux of respondent's argument for disclosure, however, is *not* that he lacks knowledge of how the Office of Independent Counsel conducted its investigation. He knows exactly what the Office did, has seen

much of the same evidence, and has devoted considerable time and hundreds of pages of briefing in this litigation to scrutinizing and critiquing it. Respondent simply disagrees with, or at least is not yet personally satisfied with, the conclusions that the Independent Counsel reached. FOIA's purpose, however, is not to obviate the persistent disbelief of a few; it is to let the public as a whole know what the government has done and to permit informed debate. Respondent's filings in this case, not to mention his website and the published books he cites (Br. in Opp. 9), stand as a testament that the public interest in examining both the death of Vincent Foster and the government's investigations of it "has been adequately served." *Ray*, 502 U.S. at 178.

Furthermore, the photographs themselves reveal nothing directly about the Office of Independent Counsel's activities; they reveal only the tragic consequences of Vincent Foster's personal conduct.[26] The photographs that respondent seeks thus are not themselves official records or information *about* the Office of Independent Counsel or its investigation into Foster's death. Nor does respondent need the photographs to determine whether the government's collection of photographs at the scene was consistent with proper law enforcement techniques. How many photographs were taken and what aspects of the death scene and Foster's body were photographed is already a matter of public record.

To the extent that respondent instead wants the photographs to supplement his own shadow investigation and to buttress his personal interpretation of the

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[26] The photographs were not taken by the Office of Independent Counsel and, indeed, that Office had no involvement in the Foster investigation until months after the death the photographs depict.

evidence surrounding Foster's death, that is a proposed *derivative* use of the records sought under FOIA. The photographs themselves do not directly reveal information about the government itself or "what the Government is up to." *Reporters Committee*, 489 U.S. at 780. While the majority in *Ray* left open the question whether a derivative use "would *ever* justify release of information about private individuals," 502 U.S. at 179 (emphasis added), Justices Scalia and Kennedy concluded that an asserted public interest under FOIA "must be solely upon what the requested information reveals, not upon what it might lead to," *id.* at 180 (Scalia, J. concurring) (emphasis omitted). More recently, in *Department of Defense* v. *FLRA*, the Court concluded that a union's intended derivative use of names and addresses to facilitate collective bargaining was not a cognizable public interest under FOIA. 510 U.S. at 497; see also *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 512 (2d Cir. 1992) (taking into account all possible derivative uses of information "would inevitably result in the disclosure of virtually all personal information, thereby effectively eviscerating the protections of privacy provided by [the FOIA]").

In short, FOIA's purpose is to allow the public to understand the operations of government; it is not to deputize every citizen as a private independent counsel with the unlimited right to examine and reevaluate all information in the government's hands in order to advance his own investigation.

3. The Photographs Ordered Released Lack Any Substantial Nexus To The Asserted Public Interest

No matter how meritorious respondent's asserted public interest, the court of appeals erred in ordering disclosure of the four photographs of Foster at his death scene because they cannot shed any relevant

light on his interest in exposing deficiencies in the Independent Counsel's investigation, see Pet. App. 58a. In weighing the public and private interests implicated under Exemption 7(C), a court "must weigh[] the specific privacy invasion against the value of disclosing a given document." *Senate of Puerto Rico*, 823 F.2d at 588; see also *ibid.* ("[T]he Senate has not adequately supported its 'public interest' claim with respect to the specific information being withheld.").

Respondent has identified four general areas of the investigation in which he alleges that the Office of Independent Counsel fell short. The first three areas of the investigation respondent cited to the court of appeals involved "which officials were present during Vincent Foster's autopsy," "witness identifications of Mr. Foster's car in Fort Marcy Park at the time of his death," and "possible discrepancies between the kind of gun that was reportedly found at the scene of Mr. Foster's death and the gun identified by his widow." Pet. App. 39a-40a; see also Br. in Opp. 23-24. The ordered release of photographs of Foster's right shoulder, arm, and torso, however, have no relevance to and can shed no light on the persons present at or the subsequent autopsy of Foster, or the appearance of Foster's abandoned car in the parking lot at Fort Marcy Park, some distance from where Foster took his life.

Only one of the four photographs the court of appeals ordered released depicts the gun in Foster's hand. But "[m]any of the 119 photographs already released to Mr. Favish depict the gun that was found at the scene." Pet. App. 40a. Respondent has made no showing, and the court of appeals offered no explanation, for how disclosure of yet another picture of the gun would materially advance the public interest. Beyond that, respondent's personal interest in seeing every picture

of the gun in the possession of the government because, in his view, the government is "demonstrably untrustworthy and deceptive" (Br. in Opp. 6) cannot be equated with the "public" interest.[27]

The remaining aspect of the investigation that respondent has identified is alleged inconsistencies in the description of the entrance and exit wounds—specifically, whether the wounds were in Foster's head or neck. Pet. App. 40a-41a; see also Br. in Opp. 8-12. But the photographs that the court of appeals ordered released, by their description in the district court opinion based on the government's *Vaughn* index, do not show any part of Foster's head or neck or any aspect of the bullet wound or the bullet's path. They

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[27] The prior unauthorized disclosure of the photograph to *Time* magazine does not affect the balance under FOIA. Such wholly unauthorized activity cannot waive either the government's interest in withholding the photograph from official release or the Foster family's profound privacy interests in cabining dissemination of the photograph, which depicts a portion of Foster's body. See *Department of Defense* v. *FLRA*, 510 U.S. at 500 ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."); *Reporters Committee*, 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public."); *Rose*, 425 U.S. at 380-381; *Sherman* v. *Department of the Army*, 244 F.3d 357, 363-364 (5th Cir. 2001) ("[T]he fact that otherwise private information at one time or in some way may have been placed in the public domain does not mean that a person irretrievably loses his or her privacy interest in the information."); *Halpern* v. *FBI*, 181 F.3d 279, 297 (2d Cir. 1999) ("Confidentiality interests [under Exemption 7(C)] cannot be waived through prior public disclosure."); *Bast*, 665 F.2d at 1255 ("[P]ublicity in the popular media cannot vitiate the FOIA privacy exemption for official information."). In any event, the public

are pictures "focusing on Rt. side shoulder/arm"; "Right hand showing gun & thumb in guard," which hand was positioned next to Foster's hip; "focusing on right side and arm"; and the "top of head thru heavy foliage." Pet. App. 45a-46a. Having reviewed the pictures *in camera* (see J.A. 7, 20), both the district court and the court of appeals were fully apprised that those photographs would do nothing to facilitate respondent's inquiry into the bullet's trajectory. Indeed, the district court, summarily affirmed by the court of appeals, could say nothing more than that the photographs "may be probative of the public's right to know." Pet. App. 45a.

In fact, it is only the photographs that the court of appeals correctly held were *exempted* from disclosure—the dramatically more graphic shots of Foster's head and face—that bear any potential relation to respondent's asserted interest in studying the bullet's path. As the D.C. Circuit explained, "[g]iven the subject matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Accuracy in Media*, 194 F.3d at 125. Unable to release the only photographs relevant to the purported public interest because of the enormous intrusion on family privacy, however, the Ninth Circuit had no equitable license to offset that withholding by ordering the release of different photographs that bear no relationship to advancing the asserted public interest.

Instead, the "workable compromise between individual rights" to privacy and the public's right to information about the government, *Rose*, 425 U.S. at 381, that FOIA's Exemption 7(C) embodies dictates that all of the pictures of Foster's dead body be kept "away from the public eye," *Reporters Committee*, 489 U.S. at

tions into his death and voluminous disclosures of information that already have taken place. The *public*'s interest in matters pertaining to his death and its investigation has been satisfied.

CONCLUSION

The portion of the judgment of the court of appeals ordering the release of four photographs should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act protects law enforcement information from public disclosure that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The question presented is whether, under Exemption 7(C), the Office of Independent Counsel properly withheld photographs of the body of Vincent W. Foster, Jr., former Deputy White House Counsel, taken by the Park Police at the scene of his suicide.

PARTIES TO THE PROCEEDING

Respondent Allan J. Favish brought this suit against Petitioner Office of Independent Counsel. Respondents Sheila Foster Anthony and Lisa Foster Moody intervened as defendants in the district court.

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BRIEF FOR RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals on the first appeal (Pet. App. 4a-43a) are reported in *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000). The order of the court of appeals and the dissenting opinion on the second appeal (Pet. App. 1a-3a) are unreported. The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc* and the dissent of Judge Pregerson (Pet. App. 63a-64a) are unreported. The opinions of the district court (Pet. App. 44a-46a, 47a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 20, 2002. That court entered an order denying timely petitions for rehearing on August 16, 2002. This Court granted the petition for a writ of certiorari filed by the Office of Independent Counsel on May 5, 2003. Petitions for a writ of certiorari filed by respondents Sheila Foster Anthony and Lisa Foster Moody (No. 02-599) and by respondent Allan J. Favish (No. 02-409) are pending. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Freedom of Information Act ("FOIA") provides that:

> (b) This section does not apply to matters that are
>
> . . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

. . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C).

STATEMENT

1. Vincent W. Foster, Jr., was Deputy White House Counsel under President Clinton. Mr. Foster was found dead in Fort Marcy Park, a national park in northern Virginia, on July 20, 1993. The National Park Service investigated his death. Later inquiries were performed by separate committees of the Senate and House of Representatives. In addition, the Office of Independent Counsel (OIC), under Robert B. Fiske, Jr., and then Kenneth W. Starr conducted two separate investigations into his death. *See Favish*, 217 F.3d at 1179-80, Pet. App. 26a-29a (Pregerson, J. dissenting) (summarizing investigations). The Starr inquiry took over three years and involved "interviews with more than thirty witnesses and analysis of hundreds of documents, forensic reports, the physical evidence, and death-scene and autopsy photographs." *Id.* at 1180, Pet. App. 28a.[1] The Starr OIC consulted various nationally recognized forensic experts. Pet. App. 28a n.8. All these investigations independently concluded that Mr. Foster committed suicide by a self-inflicted gunshot wound.

[1] The full report of the second Independent Counsel (the "Starr Report") is printed, without attachments, at JA 97-211.

Plaintiff, a lawyer and conspiracy theorist, is unpersuaded. Rather, he asserts that the numerous professional investigators and public officials who have studied Mr. Foster's death are guilty of wrongful conduct. In 1997, Plaintiff made a FOIA request for copies of 150 photographs compiled during the investigations. Following litigation (and plaintiff's withdrawal of his request for 21 photographs), he now possesses copies of 118 photographs identified in his original request. *Id.* at 1170-71, Pet. App. 6a. Also, he has been granted access to an abundance of other investigative materials that provide great detail about Mr. Foster's death and the subsequent investigations into it, including extensive information concerning the gunshot wound that caused Mr. Foster's death.[2] Plaintiff has published much of the information and materials he obtained, including 13 photographs relating to Mr. Foster's death – for example, a photograph of Mr. Foster's eyeglasses found at the death scene – on his web site http://www.allanfavish.com/photoix.htm (visited June 17, 2003).

The ten remaining photographs, taken shortly after Mr. Foster's body was discovered, depict his corpse lying in

[2] Much of this detail appears in the public Starr Report. JA 97-211. The results of the two congressional investigations, including two volumes of public hearings, also were made available to the public. *Hearings Relating to Madison County Guaranty S&L and the Whitewater Development Corporation—Washington, DC Phase*, S. Hrg. 103-889, Vols. 1 & 2 (1995); *Final Report of the Special Committee to Investigate Whitewater Development Corp. and Related Matters on the Investigation of Whitewater Development Corp. and Related Matters*, S. Rep. No. 104-280 (1996); *Report of the Committee on Banking, Housing, and Urban Affairs United States Senate on the Inquiry into the U.S. Park Police Investigation of the Death of White House Deputy Counsel Vincent W. Foster, Jr.*, S. Rep. No. 103-433 (1996).

Fort Marcy Park.[3] Mr. Foster's widow and sister have intervened in this case because they believe that release of these photographs would constitute a severe and unwarranted invasion of their family's privacy. By invading their memory of a loved one, by subjecting them to harassment from any number of media outlets, and by leaving them vulnerable to the unwitting viewing of profoundly disturbing images, disclosure of these photographs clearly would implicate their family's privacy interests.

2. Plaintiff also participated as counsel in a FOIA suit in the District of Columbia brought by an organization seeking photographs of Mr. Foster's body at the death scene and the autopsy, including the same photographs at issue here. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000).[4] The D.C. Circuit affirmed the district court's ruling that plaintiff, which had presented paltry evidence of government wrongdoing, had not shown a sufficient public interest in disclosure to outweigh the Foster family's privacy interest in the photographs. *Id.*

3. Plaintiff brought this action in the Central District of California against the Office of Independent Counsel, seeking numerous photographs relating to Mr. Foster's suicide. To support the OIC's defense, Respondents Anthony and Moody submitted Declarations attesting to the invasions of family privacy that release of the photographs would entail. Those Declarations also described the prior severe impact on the family of a black and white copy of a

[3] The district court's description and discussion of each photograph appears at Pet. App. 45a-46a.

[4] The D.C. Circuit case involved black and white copies of the photographs. The present case involves color Polaroid originals. *Favish*, 217 F.3d at 1177, Pet. App. 21a-22a.

death scene photograph depicting Mr. Foster's right hand holding the gun that took his life, which had been leaked to and published by the national media. The district court ordered disclosure of some photographs, but refused disclosure of the ten death scene photographs that showed Mr. Foster's body or face. The district court found that plaintiff had not "sufficiently explained how the disclosure of these photographs will illuminate any deficiencies of the OIC investigation." Pet. App. 59a. The court concluded that "[d]ue to this uncertainty and the extensive investigation of this affair that has already occurred, the Court finds that the privacy interests of the Foster family members outweigh the public interest in disclosure." Pet. App. 59a.

Plaintiff appealed, and the Ninth Circuit, although concluding that there is a survivor's right of privacy, reversed and remanded. The appellate court directed the district court to examine the photographs *in camera* in order to weigh the privacy interests of the Foster family against the claimed public interest in disclosure. *Favish*, 217 F.3d at 1174, Pet. App. 13a-14a. Judge Pregerson dissented in part. He found that the Vaughn index submitted by the OIC contained a sufficiently detailed description of the photographs to obviate the need for *in camera* review and that the Foster family's compelling privacy interest clearly outweighed any public interest in disclosure of the death scene photographs, except as to the photograph of Mr. Foster's right hand holding the gun, which Judge Pregerson would have released. *Id.* at 1186-87, Pet. App. 43a.[5]

Plaintiff had asserted that the ten photographs of Mr. Foster's face and body were needed to explain purported deficiencies and inconsistencies in the Starr Report

[5] The Vaughn index's description of the photographs appears at *Favish*, 217 F.3d at 1176-77, Pet. App. 20a.

concerning the nature and location of the entrance and exit wounds – deficiencies and inconsistencies that, plaintiff contended, supported his overall contention that the OIC's investigation was "grossly incomplete and untrustworthy." *Id.* at 1184, 1185-86, Pet. App. 38a-43a. Judge Pregerson in dissent rejected plaintiff's assertion, agreeing with the D.C. Circuit's conclusion that the claimed shortcomings were not sufficient to show wrongful agency conduct or to establish a public interest in disclosure that outweighed the Foster family's privacy interest. *Id.* at 1185-86, Pet. App. 40a-43a. (citing *Accuracy in Media*, 194 F.3d at 124). In concluding that *in camera* inspection was not needed, Judge Pregerson concurred with the D.C. Circuit's observation that "we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic." *Id.* at 1177, Pet. App. 22a (quoting *Accuracy in Media*, 194 F.3d at 125).

In contrast, the Ninth Circuit majority stated that a FOIA requester is not required to have knowledge or evidence of agency wrongdoing. *Id.* at 1172, Pet. App. 10a-11a. The court did note that plaintiff had offered evidence and arguments that the OIC had engaged in misfeasance in its investigation of Foster's death, but concluded that "it is not the function of the court in a FOIA proceeding to weigh such evidence or adjudicate such arguments." *Id.* at 1173, Pet. App. 11a. The Ninth Circuit dismissed the relevance of the multiple investigations concluding that Mr. Foster's death was a suicide in Fort Marcy Park, stating:

> Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations . . . [I]t is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point.

Id. at 1173, Pet. App. 11a.

Judge Pregerson disagreed, stating that, given the unanimous conclusion reached by multiple investigations and the fact that "[i]ntense media scrutiny . . . has also reached the same conclusion and has uncovered no wrongdoing, . . . the public's interest in further investigating Vincent Foster's death has significantly diminished." *Id.* at 1185, Pet. App. 39a.

The OIC had represented to the court of appeals that the withheld photographs are "graphic, explicit, and extremely upsetting." *Id.* at 1174, Pet. App. 13a-14a. The court, however, in remanding concluded that this description "is not true of the photo already published in *Time* and on television, showing a hand holding a gun," adding that: "It may be true of the remaining 9 photos. But no court has ever seen them." *Id.*

4. On remand, the district court interpreted the court of appeals decision as limiting the Foster family's privacy interest to items that are "graphic, explicit, and extremely upsetting." It concluded that five of the photographs fit this description and therefore were precluded from disclosure under FOIA Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). However, it granted disclosure with respect to the remaining five photographs that it found did not meet this test. Pet. App. 44a-46a. But the district court made no finding as to how photographs that were not "graphic, explicit, and extremely upsetting" might nevertheless contain

sufficient detail to elucidate the true nature of Mr. Foster's wounds and thus advance the alleged public interest.

Sheila Foster Anthony and Lisa Foster Moody then intervened as defendants, submitting additional Declarations in support of their motion for reconsideration. JA 90-96.[6] When that motion was denied, they joined in the OIC's appeal. Plaintiff also appealed.

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[6] The Amended Declaration of Mr. Foster's widow stated:

> I did not even open Vince's casket for fear of seeing him distorted by the autopsy. I surely cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet. My understanding of the photographs is that all of them would be extremely upsetting to the family and cause us no end of pain and sorrow. The shock of seeing the picture of Vince on the television with the gun in his hand is still a horrifying memory for me. . . . JA 95.

The Amended Declaration of Mr. Foster's sister stated:

> Our family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand holding the gun he used to kill himself. That photograph has been shown in national media again and again and every time I see it I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life. My mother has suffered unimaginable sorrow and depression in losing her only son, but her grief (and ours) has been compounded by the fear that she will see upsetting reports[ ] about him on her television set or see headlines and photographs in the tabloids on the grocery store racks where she shops. . . . JA 91-92.

Ms. Anthony and Ms. Foster, as well as the OIC, vigorously argued that the district court had erred badly in concluding that the Ninth Circuit has ruled that the photographs must be "graphic, explicit, and extremely upsetting" before the survivor's right of privacy attaches. However, after *in camera* review of the photographs, the Ninth Circuit, failing to deal with this argument, summarily affirmed the district court's judgment, except as to one of the photographs that the district court had ordered released, which the panel concluded should not be. Judge Pregerson dissented, reiterating his position that nine of the photographs implicate a privacy interest that outweighs any interest that the public possesses in their release. Pet. App. 2a-3a. The court, with Judge Pregerson again dissenting, declined to reconsider its decision *en banc*. Pet. App. 63a.

SUMMARY OF ARGUMENT

Respondent Favish's ghoulish attempt to obtain and publicize photographs of Vince Foster lying dead in Fort Marcy Park is not supported by any legitimate public interest and, if successful, would trample on fundamental privacy interests of Mr. Foster's survivors.

1. FOIA Exemption 7(C) authorizes agencies to withhold law enforcement information where public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C § 552(b)(7)(C). Public disclosure may be "warranted" only if it would throw light on the operations of government. In this case, plaintiff asserts that public disclosure may show that the numerous investigations of Vincent Foster's death – all of which concluded that he committed suicide – ignored contrary evidence and were mishandled. But the D.C. Circuit, in a case involving the same photographs at issue here, correctly concluded that plaintiff's evidence of official

wrongdoing was not compelling or persuasive and thus should not be allowed to override the invasion of the Foster family's privacy that publication of photographs of Mr. Foster's body would entail.

The D.C. Circuit was right. Given the numerous investigations of the Foster death, the unanimous conclusion that he committed suicide, and the voluminous material already made public, it may "reasonably be expected" that publication of these photographs will add nothing further to public understanding of the workings of government and will accomplish nothing but further intrusion on the Foster family's privacy. The D.C. Circuit correctly required compelling, or at least persuasive, evidence that public release of these photographs would further the public interest by showing official wrongdoing before concluding that such release was warranted. The Ninth Circuit's minimal standard for overriding privacy concerns would undermine the significant privacy protections Congress intended Exemption 7(C) to provide. The kinds of minor inconsistencies plaintiff alleges are typically present in any large, high-profile investigation. If they are enough to overcome privacy protection, persons like plaintiff will have free rein to rummage through law enforcement records and publish any material they obtain, no matter how damaging that may be to privacy rights.

The Ninth Circuit also erred by failing to recognize that the numerous investigations of Foster's death, all of which found that he shot himself, bolstered the conclusion that publication of the photographs was not warranted because they could not reasonably be expected to support a finding that there was official falsification. And the Ninth Circuit's error was compounded by its failure to find any plausible nexus between the photographs and the public interest asserted as a justification for their public release.

2. Unanimous case law under FOIA establishes that there is a survivors' privacy interest and that public disclosure of autopsy and other photographs of a corpse violates the privacy of the surviving family. The decision rejecting a request for FOIA disclosure of the autopsy photographs of President Kennedy is just one example of the firm stance courts have taken against such appalling requests. *Katz v. Nat'l Archives & Records Admin*, 862 F.Supp. 476 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995).

This Court should follow this authority. Publication of photographs of a family member's body is a highly offensive intrusion into the family's privacy. It is the modern equivalent of putting the body itself on public display – an act that since ancient times has been regarded as a highly offensive intrusion on family rights. The harm exists whether or not the photographs display gruesome details. Both law and long-standing tradition establish that a deceased's family has the right to deal with the body according to the family's customs and beliefs, and to take final leave of their loved one in a private manner, if they so choose. Public release of these photographs would intrude on that right and cause the Foster family extreme grief, anguish and mortification.

ARGUMENT

PLAINTIFF DID NOT MAKE A SHOWING OF PUBLIC INTEREST SUFFICIENT TO OVERCOME THE FOSTER FAMILY'S SIGNIFICANT PRIVACY INTEREST IN PHOTOGRAPHS OF MR. FOSTER'S BODY.

FOIA Exemption 7(C) protects from public disclosure law enforcement records or information the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). To determine whether an invasion of privacy could reasonably be expected to be "unwarranted," "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989).

The court of appeals erred in this case on both sides of the balance, by i) concluding that Favish had demonstrated a public interest in disclosure with respect to the photographs the court ordered released, and by ii) concluding that the invasion of privacy occasioned by release of these photographs did not outweigh the purported public interest served. The result is a decision that allows a shocking intrusion into the Foster family's privacy that is not justified by any public interest in understanding the workings of government. The court of appeals conclusion is all the more disturbing because it confirmed the district court's palpably misguided opinion without undertaking to write an opinion that explained its problematic conclusions. We thus are left with an unprincipled decision that may well render government agencies investigating incidents of violent death unable to prevent gross intrusions on the privacy of surviving family members.

A. Plaintiff's Allegations Are Insufficient To Demonstrate A Public Interest In Disclosure Of Photographs That Would Invade The Foster Family's Privacy.

Under FOIA, public disclosure that could reasonably be expected to invade privacy rights is "warranted" only if it would "contribute[] significantly to public understanding *of the operation or activities of the government*." *Reporters Committee*, 489 U.S. at 775 (emphasis in original). In the courts below, plaintiff contended that public disclosure of the photographs of Mr. Foster's body would meet this standard, because the photographs might show that the various investigations of Mr. Foster's death – all of which concluded that he committed suicide – were mishandled and untrustworthy.

The D.C. Circuit properly concluded that public disclosure of the same photographs would not meet that standard, because the various inconsistencies alleged in the evidence concerning Mr. Foster's death – the same inconsistencies Favish alleges here – were not "persuasive evidence . . . much less compelling evidence" of falsification in the Starr Report or in the other investigations also concluding that Mr. Foster committed suicide. *Accuracy in Media,* 194 F.3d 120, 124 (D.C. Cir. 1999).

The Ninth Circuit's opposite conclusion stemmed from three errors: 1) its use of an overly lax standard for determining whether the plaintiff had shown a public interest in disclosure; 2) its refusal to take into account the unanimous conclusion of the five previous investigations, including that by Independent Counsel Starr, all of which found that Mr. Foster committed suicide, and the extensive public disclosures that accompanied those investigations;

and 3) its failure to find a nexus between the photographs released and the asserted public interest.

1. The D.C. Circuit was correct, in a situation where government malfeasance is asserted, in requiring "compelling" evidence that the photographs would show official wrongdoing before concluding that disclosure of the photographs would be "warranted." *Accuracy in Media*, 194 F.3d at 124; *see also SafeCard Serv., Inc. v. SEC*, 926 F.2d 1197, 1205-6 (D.C. Cir. 1991). This requirement is consistent with the language and the purpose of the statute. Before its amendment in 1986, Exemption 7(C) accorded protection from public disclosure only if it "would constitute" an unwarranted invasion of personal privacy.[7] Exemption 7(C) was amended in 1986 to provide protection if public disclosure "could reasonably be expected" to constitute an unwarranted invasion of personal privacy.[8] Absent compelling evidence that the photographs may be expected to contradict the conclusion of the Starr Report and the four previous investigations that Mr. Foster committed suicide, it "could reasonably be expected" that the photographs will be consistent with that determination and thus their public disclosure would be an "unwarranted" invasion of the Foster family's privacy. Only compelling, or at the very least persuasive, evidence would be sufficient to dispel the "reasonable expectation" that the invasion of privacy resulting from public disclosure of these photographs would be "unwarranted."

Even before the 1986 amendment, Exemption 7(C) contained language requiring a higher level of protection than the Ninth Circuit afforded. As this Court has observed, Exemption 6 protects personnel and medical files where

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[7] Pub. L. 93-502, § 2, 88 Stat. 1563.

[8] Pub. L. 99-570, §§ 1801, 1802, 100 Stat. 3207-48, 3207-49.

disclosure would constitute a "clearly unwarranted" invasion of privacy, while "the adverb 'clearly' is omitted from Exemption 7(C)." *Reporters Committee*, 489 U.S. at 756. "This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President." *Id.*[9] By allowing the agency to withhold disclosure by showing that disclosure was "unwarranted" – not "clearly unwarranted" – Congress eased the agency's burden in seeking to protect law enforcement information implicating privacy concerns and made it correspondingly more difficult for FOIA requesters to obtain such information. The Ninth Circuit's test is inconsistent with the 1974 amendment, because it allows a FOIA requester to overcome privacy concerns by making allegations the court is required to accept, regardless whether they carry any persuasive weight. Nothing could be further from the congressional intent to lessen the agency's burden in protecting privacy, not the requester's burden in seeking to override privacy.

While other FOIA Exemptions are to be construed narrowly to favor the Act's overall policy of disclosure, Exemption 7(C) is "notable" in that it requires a balance that "is not similarly 'tilted emphatically in favor of disclosure.'" *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (R. Ginsburg, J.) (quoting *Bast v. United States Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). Both the 1974 amendment eliminating the "clearly unwarranted" requirement, and the 1986 amendment adding the "reasonable expectation" test represented a "considered congressional effort 'to ease considerably a

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[9] The President told Congress that he was "concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*." 120 Cong. Rec. 34163 (Oct. 7, 1974) (emphasis in original).

Federal law enforcement agency's burden in invoking [Exemption 7(C)].'" *Reporters Committee*, 489 U.S. at 756 n.9 (quoting 132 Cong. Rec. 31425 (October 15, 1986) (statement of Sen. Hatch)). Congress' intent to provide significant privacy protection would be undermined unless FOIA requesters are required to make a significant showing of public interest before obtaining access to law enforcement records implicating privacy rights.

Inconsistencies such as Favish cites in the evidence concerning Foster's death are a common occurrence in complex investigations. As the D.C. Circuit correctly pointed out, "[w]hen multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification." *Accuracy in Media,* 194 F.3d 120, 124 (D.C. Cir. 1999). If Favish's preliminary showing were sufficient to require public disclosure of private material in the hands of law enforcement agencies, Exemption 7(C)'s protection would be greatly weakened. "[S]uch a facile doffing of the cloak of confidentiality" would not be consistent with the congressional purpose. *Irons v. FBI*, 811 F.2d 681, 687 (1st Cir. 1987).

The D.C. Circuit's requirement of compelling, or at least persuasive, evidence of wrongdoing is also consistent with the position taken by other circuits, which have insisted that FOIA requesters must go beyond mere allegations to overcome the statute's protection of personal privacy. *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest in law enforcement records naming individual FBI agents, suspects and other persons interviewed is "negligible," "there being no compelling allegation of agency corruption or illegality"); *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) ("broad

unsupported hints of a government coverup" are insufficient to overcome privacy interests implicated by law enforcement records); *KTVY-TV v. United States*, 919 F.2d 1465, 1470 (10th Cir. 1990) ("broad unsupported statement of possible neglect" in investigation insufficient to overcome privacy concerns in investigative records).

The Ninth Circuit concluded that Favish's request was sufficient because he "tender[ed] evidence and argument which, *if believed*, would justify his doubts [concerning the various investigations of Foster's death]." 217 F.3d at 1173, Pet. App. 11a (emphasis added). The Ninth Circuit concluded that it was not the function of the court "to weigh such evidence or adjudicate such arguments." *Id.* In essence, the Ninth Circuit applied the standard used to determine whether a litigant has adduced sufficient evidence to survive a motion for summary judgment.[10] But the consequence of a denial of a motion for summary judgment is that a case must proceed to trial. Here, the consequence of holding that Favish has made a sufficient showing to obtain the photographs is their production. We know of no support in any area of the law for the proposition that a litigant seeking to overcome the other party's *substantive* rights need only make a showing that, "if believed," would entitle him or her to relief. Such a minimal standard is particularly unjustified in a FOIA privacy case, because it essentially undermines the congressional intent that Exemption 7(C) provide significant privacy protection.

2. The need for a high threshold for a FOIA requester's showing of public interest is especially

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[10] The case cited by the Ninth Circuit to support its test addressed the issue of the standard to be applied as to motions for summary judgment. 217 F.3d at 1173, Pet. App. 11a (citing *Washington Post Co. v. United States Dep't of Health and Human Serv.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

compelling in the present context, where there already have been five investigations of Mr. Foster's death – by the Park Police; the first Independent Counsel (Robert B. Fiske, Jr.); the ranking Republican Member of the House Committee on Government Operations; the Senate Committee on Banking, Housing, and Urban Affairs; and the second Independent Counsel (Kenneth W. Starr).[11] All these investigations came to the same conclusion – that Mr. Foster died by his own hand.

The thoroughness and seriousness of these investigations is illustrated by the report of the investigation of the second Independent Counsel (the Starr Report). JA97-211. This investigation took testimony from 31 witnesses, 19 of whom observed Mr. Foster's body (including 9 Park Police and 8 Fairfax County Fire and Rescue Department personnel). JA 120. The Starr Report describes the testimony of these witnesses at length, including testimony "not[ing] a wound out the back of [Foster's] head, and blood on the ground underneath his head and back. [The

[11] The first four investigations are described at JA 104-08. The Starr Report is printed at pp. 97-211 of the Joint Appendix. The Fiske Report was also published (*Report of the Indep. Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr.* (June 30, 1994)), as were the two Congressional Reports. *Final Report of the Special Committee to Investigate Whitewater Development Corp. and Related Matters on the Investigation of Whitewater Development Corp. and Related Matters*, S. Rep. No. 104-280 (1996); *Report of the Committee on Banking, Housing, and Urban Affairs Unisted States Senate on the Inquiry into the U.S. Park Police Investigation of the Death of White House Deputy Counsel Vincent W. Foster, Jr.*, S. Rep. No. 103-433 (1996). Together, the investigative bodies have released over one hundred photographs and hundreds of pages of supporting materials. Mr. Favish has drawn heavily on this material in attempting to make his case. *See* Plaintiff's Motion for Summary Judgment Excerpts of Record Vol. 1, pp. 1-41 nn.2-5, 43, 46-57, 63-76, 78-107, 113-119, 122-129, 133-155, 159, 160, 164, *Favish v. Office of Indep. Counsel* (9th Cir. 2001) (No. 01-55487).

witnesses] observed no signs of a struggle." JA 125-26 (citations omitted).

The Starr Report contains an extensive description of the autopsy, conducted by Dr. James Beyer, the Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner. JA 128. Dr. Beyer (who had performed over 20,000 autopsies) concluded that Foster died of a self-inflicted wound. JA 134. The Starr Report describes the basis for this finding in painstaking detail, including the location of the wound, the presence of "gunpowder debris" on Mr. Foster's hand and in his mouth, and the absence of any other wound to indicate that there had been a struggle. JA 129-34. The Starr Report states that two sets of independently retained experts reviewed Dr. Beyer's conclusion and agreed with it. JA 134. Later laboratory analysis and test firings of the gun used, together with autopsy photographs showing powder residue on his hands, led another expert to conclude that "Mr. Foster held the weapon when it was fired." JA 141-43.[12]

The Starr Report contains an extensive analysis of the pattern of blood on the body and the ground, concluding that it was inconsistent with any theory that the fatal shot had been fired elsewhere and the body moved to the scene. JA 146-49, 165-68. The Starr Report also describes extensively the conclusion of a pathologist that Mr. Foster committed suicide, JA 159-65, a conclusion with which a separate panel of pathologists agreed. JA 162-63 nn. 187, 189, 190. In addition, the Starr Report discusses other evidence, including evidence that the gun used belonged to Mr. Foster (JA 152-54, 179-84), and evidence that "Mr. Foster was, in fact,

[12] This conclusion was reached by Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction and Director of the Connecticut State Police Forensic Science Laboratory. JA 102, 143-44.

distressed or depressed in a manner consistent with suicide." JA 202-08.

The Ninth Circuit brushed aside the argument that Favish faced a high burden in seeking photographs to challenge the conclusion reached by the Starr Report and four previous investigations, commenting that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations." 217 F.3d at 1173, Pet. App. 11a. But the statute requires public disclosure of privacy-invading material to be "warranted." In determining whether public disclosure of the photographs is "warranted," it is surely relevant that other investigations came to the same conclusion that the person seeking public disclosure seeks to challenge. Given the thoroughness of the Starr investigation and the numerous previous investigations that reached the same determination, the "reasonable expectation" – indeed, the overwhelming presumption – is that *no* public benefit will be gained by public disclosure of the photographs, and that disclosure thus will not be "warranted."

Favish has made no showing, and certainly not a compelling or even persuasive showing, that public disclosure of the photographs would warrant an invasion of the Foster family's privacy. The family's right to privacy should not be sacrificed on the basis of the minimal showing that satisfied the Ninth Circuit. And surely such legitimate privacy interests should not be made to yield to some macabre voyeurism masquerading as public interest.

Both this Court and the courts of appeals have recognized that previous public disclosures are an important element in the balancing judgment the FOIA requires for cases involving personal privacy. In *United States Dep't of State v. Ray*, 502 U.S. 164 (1991), this Court upheld the

withholding of the names of Haitian refugees interviewed by the State Department, where disclosure would invade privacy and the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178. The Seventh Circuit sustained the withholding of FBI agent names from disclosure on privacy grounds, where "[t]he documents [already released] reveal the entire course of the investigation and the facts it uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation." *Miller*, 661 F.2d 623, 630-31. *See also Bast*, 665 F.2d 1251, 1255 (public interest "[has] been served to a large extent by the substantial release of information already made in this case"); *Halloran v. United States Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) (public interest "has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation"). The Ninth Circuit's casual dismissal of prior investigations and prior disclosures was in error.

3. The Ninth Circuit's error was compounded by its failure to find any nexus between the specific photographs at issue and the public interest asserted to justify their release. As the D.C. Circuit has noted, where there already has been significant public disclosure, "it is the incremental advantage to the public of releasing [the information sought] which must be weighed against the invasion of personal privacy." *Bast*, 665 F.2d at 1255. Favish needs to show that the "incremental advantage" of public release of these photographs outweighs the invasion of the Foster family's privacy. On this score, Favish's already weak case is further weakened by his inability to demonstrate any nexus between the photographs and the public interest he asserts. It is not sufficient for him to raise general doubts about the investigation (although he has not even done that); he must make a showing of public interest "with respect to the

specific information being withheld." *Senate of Puerto Rico*, 823 F.2d at 588. But Favish has not demonstrated, with respect to any of the photographs, that "any benefit would accrue to the public from the disclosure of this document." *Kimberlin v. United States Dep't of Treasury*, 774 F.2d 204, 208 (7th Cir. 1985).

Favish's principal claim is that there are inconsistencies with respect to the location of the exit wound. However, the Ninth Circuit ordered release only of those photographs that were not "graphic, explicit and extremely disturbing." 217 F.3d at 1174, Pet. App. 13a-14a. As the D.C. Circuit observed, it is difficult to understand how any photograph not "disturbingly graphic" "could . . . elucidate the true nature of Mr. Foster's wounds." *Accuracy in Media*, 194 F.3d at 125. Because the photographs are not explicit enough to show the exact nature of Mr. Foster's wounds, which is Favish's goal, there is no public interest in their release. "In the absence of any public interest in disclosure, any countervailing interest in privacy defeats a FOIA request." *Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir. 2002), *petition for cert. filed* (U.S. Aug. 2, 2002) (No. 02-5651). "[S]omething, even a modest privacy interest, outweighs nothing everytime." *Nat'l Ass'n of Retired Fed. Emp. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989.) The Ninth Circuit's action, which furthers no ascertainable public interest, is at its core incomprehensible.

B. A Surviving Family Has A Significant Privacy Interest In Photographs Of A Family Member's Body.

The court of appeals agreed that surviving family members have a privacy interest in photographs of their loved one's dead body, stating:

> What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.
>
> We hold as a matter of law that the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.

217 F.3d at 1134, Pet. App. 13a.

The court, however, refused to enforce the survivor's privacy right as to those photographs it did not find to be "graphic, explicit, and extremely upsetting."[13] The court of appeals was right as to the existence of a privacy interest, but wrong in concluding that disclosure of photographs it apparently did not deem "graphic, explicit, and extremely upsetting" did not constitute an unwarranted invasion of personal privacy.

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[13] As observed, the district court erroneously held that a privacy interest was not implicated by photographs that were not "graphic, explicit, and extremely upsetting." Pet. App. 44a-46a. The Ninth Circuit's cryptic summary affirmance apparently embodies its conclusion that the Foster family had no privacy interest in photographs not meeting that description.

1. The case law under FOIA is unanimous that surviving families have a right of privacy in photographs of a family member's body, and on that basis the courts have rejected public disclosure of such photographs under the FOIA. *Accuracy in Media*, 194 F.3d at 122-23 (death scene and autopsy photographs of Vincent Foster); *Hale v. United States Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) (photographs of murder victim); *Katz*, 862 F.Supp. 476 (autopsy photographs of President Kennedy). Other cases have refused to order public disclosure of autopsy reports, because of the surviving family members' privacy rights. *Bowen v. United States Food & Drug Admin.*, 925 F.2d 1225, 1228-29 (9th Cir. 1991); *Badhwar v. United States Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports that "would shock the sensibilities of surviving kin" protected by Exemption 6); *Marzen v. United States Dep't of Health and Human Serv.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (medical records of deceased infant protected by Exemptions 6 and 7(C)). *Cf. Campus Communications v. Earnhardt*, 821 So.2d 388, 401 (Fla. App. 2002) (denying release of autopsy photographs of race car driver killed in racing accident).

A particularly important precedent is the D.C. Circuit's decision refusing to order disclosure of reports on the FBI's surveillance of Dr. Martin Luther King, Jr., on the ground that disclosure would invade the privacy rights of Dr. King's family and associates. *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980). That case was decided six years before the 1986 legislation that significantly amended Exemption 7(C), but left in place the Exemption's stricture against an "unwarranted invasion of personal privacy." Pub. L. 99-570, §§ 1801, 1802, 100 Stat. 3207-48, 3207-49. Given its subject matter, the case must

have been known to Congress. When Congress amends a statute without repealing a prominent precedent, there is a "presumption that Congress intended to embody [the precedent] in the amended version." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S 768, 782 (1985).

These cases are consistent with the Attorney General's interpretation of Exemption 6 as originally passed in 1966 P.L. 89-487, 80 Stat. 250. The Attorney General concluded that the provision's protection of "personal privacy" was intended to cover "the privacy of any person, including members of the family of the person to whom the information pertains." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 31 (June 1967) (http://www.usdoj.gov/04foia/67agmemo.htm). The Act's reference to "personal privacy" was not intended to preclude claims by surviving family members; rather, this language established that "[t]he right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association." *Washington Research Project v. United States Dep't of Health, Educ. and Welfare*, 366 F.Supp. 929, 937-38 (D.D.C. 1973) (Gesell, J.), *rev'd in part on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), followed in *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980), *rev'd in part on other grounds*, 471 U.S. 159 (1985); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

Also instructive is the *Restatement of Torts*, which establishes that right of privacy protects intimate family matters from "highly offensive" publicity. *Restatement (Second) of Torts* § 652D and cmt. b at 386. (1977).[14]

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[14] The *Restatement* addresses the scope of the tort action for violation of privacy. This Court has stated that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy. . .

Public display of photographs of the dead body of a family member is a matter concerning the family life of the survivors, which normally would be "highly offensive" to any reasonable person. A death in the family is, of course, a supremely important family event. The moments surrounding death are typically reserved for close family, wherever possible. Even after death, both law and long-standing tradition recognize that the family has a right to the body in order to give it a private burial or other leave-taking consonant with the family's beliefs and traditions.[15] Any conduct that puts the body on public display without the family's consent[16] has been regarded as highly offensive since the origins of our civilization.[17]

Publication of photographs of a body is the modern-day equivalent of putting the body itself on public display. The reaction of Foster's widow to the leaked photograph – her "shock of seeing the picture of Vince on the television with the gun in his hand" (Amended Decl. of Lisa Foster Moody, JA 95) – was not an aberration. Virtually any family in the same situation would understand why the Foster family "cannot bear seeing him lying on the ground in Fort Marcy Park with blood stains on him, coupled with the indignity of the whole world's viewing these pictures in tabloids or on the Internet." *Id.* The Foster family's desire to protect Mr. Foster's elderly mother from seeing that kind of photograph on television or on the tabloids at the supermarket checkout counter (Amended Decl. of Sheila Foster Anthony, JA 91-92) is totally understandable. "One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos." *Accuracy in Media,* 194 F.3d at 123.[18] The right of privacy should protect the Foster family from the "additional torment which would result from the release of these graphic

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." *Reporters Committee*, 489 U.S. at 762 n.13. Nevertheless, the common law meaning of privacy helps to illuminate the statutory meaning, as this Court also recognized in *Reporters Committee*. 489 U.S. at 763 n.15 (discussing common law and citing Section 652D of the *Restatement*). See also *Marzen*, 825 F.2d at 1152; "Although the common law doctrine of privacy may assist analysis, the privacy exemption under FOIA is not designed to prevent what would be tortious at common law. Congress intended that the privacy interest protected under FOIA extend beyond the common law."

15 The family's right to bury its dead is "sacred to the individual." *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905). "[I]n order to respect 'those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes,' . . . this Court has consistently found that a decedent's next of kin has a personal, quasi-property right in his or her corpse to ensure its proper handling and burial." *Bauer v. North Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 243 (Ga. App. 1999) (quoting *Louisville & N.R.. Co. v. Wilson*, 51 S.E. 24 (Ga. 1905)). *See also Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W.Va. 1985) (Survivors have a right "to have the body treated with decent respect, without outrage or indignity"). "Irrespective of one's religious views, and even if one is an atheist or an agnostic, it is almost universally understood that the bodies of the dead are to be treated with the utmost respect and in a manner that will not inflict any more emotional pain upon 'the wounded hearts of friends and mourners.'" *State v. Condon*, 789 N.E.2d 696, 706 (Ohio App. 2003) (quoting *Commonwealth v. Browne*, 74 Pa. D. & C. 2d 724, 730 (Pa. Com. Pl. 1976)).

16 Mr. Foster's casket remained closed throughout the funeral. Amended Declaration of Lisa Foster Moody, JA 95.

17 In the *Iliad*, after Achilles kills Hector in battle, he drags his body in the dirt and leaves it on public display. He is then told that "the gods frown" on his conduct and that Zeus is "angered," and so he returns Hector's body to his father for funeral rites according to the customs of Troy. Homer, *Iliad* Book 24 (translation by Richmond Lattimore).

18 The incident is described in Dorothy Herrmann's *Anne Morrow Lindbergh, A Gift for Life*, 110 (1992), and in James C. Giblin's *Charles A. Lindbergh, A Human Hero*, 132 (1997).

photographs."[19] Amended Decl. of Sheila Foster Anthony, JA 92.

2. The Ninth Circuit summarily affirmed the district court's order to disclose photographs of Foster's body that the district court did not consider to be "graphic, explicit, and extremely upsetting." Pet. App. 44a-46a. It is difficult to know exactly what the Ninth Circuit meant by this truncated ruling, although it appears to confirm the district court's view that photographs not meeting that description do not implicate a privacy interest.

Such a standard, however, exhibits an overly narrow conception of the surviving family's privacy right. The intrusion on the family's privacy arises from the public display of images of the loved one's dead body; it does not depend on whether the body is blood-covered. Photographs of the body that do not show blood may be less offensive to disinterested third parties. But it is the privacy of the Foster family – not disinterested observers – that is at stake. Any public display of photographs of Foster's body, blood-stained or not, would be a highly offensive intrusion into the family's privacy.

The Ninth Circuit did not consider the leaked photograph of Foster's dead hand to be "graphic, explicit, and highly disturbing." Pet. App. 13a-14a. Nevertheless, regardless of how a disinterested observer may have reacted, the "family was horrified and devastated by the photograph leaked to the press and published on a national television network and in newspapers of Vince's dear dead hand

[19] The family has assiduously protected its privacy and turned down all requests for TV appearances and other interviews, with the exception of one dignified, restrained interview in homage to Mr. Foster that his widow gave to the New Yorker magazine. Peter Boyer, *Life After Vince*, The New Yorker (Sep. 11, 1995) at 54.

holding the gun he used to kill himself." Amended Decl. of Sheila Foster Anthony, JA 91. The family's reaction was entirely understandable. The offense to the family stems from public display of the body, without regard to whether a photograph might be viewed by a disinterested observer as graphic, explicit, or extremely upsetting.[20]

As previously described, the lower courts have extended privacy protection to a deceased's medical records and autopsy reports, without any showing that they were "graphic, explicit and extremely disturbing." *Badhwar v. United States Dep't of the Air Force*, *supra*; *Bowen v. United States Food & Drug Admin.*, *supra*; *Marzen v. Dep't of Health and Human Serv.*, *supra*. A district court accorded privacy protection to the tapes of the last moments of the crew of the Challenger, with no indication that these tapes met the Ninth Circuit's test. *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C. 1991). Following 9/11, the FBI granted the same protection to the tape of the final moments in the cabin of Flight 93, allowing it to be heard only by the surviving families.[21] These cases and conduct recognize that

[20] For these reasons, the court of appeals should have withheld the photograph of Foster's dead hand, as well as the other photographs at issue. As noted, that photograph already had been leaked and widely published in the media. Nevertheless, "renewed publicity brings with it renewed invasion of privacy. The renewed intrusion is subject, in its own right, to FOIA protection." *Bast*, 665 F.2d at 1255. The fact that the body has been displayed partially once before does not make a second public display any less offensive.

Moreover, the photographs of Mr. Foster's hand holding the gun at issue here is a color original. The photograph previously leaked was a black and white copy. Disclosure of a *color* photograph would have an even more intrusive impact on family sensitivities.

[21] Susan Sward, *The Voice of the Survivors: Flight 93, Fight to Hear Tape Transformed Her Life*,, S.F. Chron., Apr. 21, 2002; Don Phillips and Dan Eggen, *Pilots Assail Plan to Play Flight 83 Voice*

surviving families have a privacy interest that is violated by public display of images and sounds of the moments surrounding the death of their loved ones, regardless whether these images and sounds might be regarded by disinterested observers as "graphic, explicit, and extremely disturbing."

CONCLUSION

The judgment of the court of appeals, to the extent that it requires the release of four photographs of Mr. Foster's body, should be reversed, with directions to dismiss the complaint.

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Recording; Precedent Feared in FBI Decision to Let Victims' Families Listen, The Wash. Post, Apr. 16, 2002, at A03.

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No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS OF RESPONDENT ALLAN J. FAVISH

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BRIEF ON THE MERITS OF RESPONDENT ALLAN J. FAVISH

STATUTES INVOLVED

In addition to 5 U.S.C. § 552(b)(7)(C), the following portion of the Freedom of Information Act ("FOIA"): "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

STATEMENT OF THE CASE

The photos are identified in the district court's order (ER 409-10) by the descriptions of the photos used in an FBI evidence receipt (ER 239, 557). The ten subject photos are among the 18 photos listed on the evidence receipt.

Favish made requests to the district court and the Ninth Circuit that if any portion of the photos is to be withheld, then those portions should be redacted and the remaining portions released.[1] Neither court addressed those requests.

After the decision by the Ninth Circuit in Appeal I (*Favish v. OIC*, 217 F.3d 1168 (9th Cir. 2000)), Favish requested that before the district court view the photos *in camera*, it allow deposition testimony of Assistant United States Attorney Miquel Rodriguez, who was in charge of Kenneth Starr's Foster investigation in 1994-95, and his former assistant. ER 220-26. Favish moved to compel that testimony. ER 411-73, 664-71. The motion was denied. ER 713. In his second appeal Favish requested that the testimony be allowed.[2] The Ninth Circuit did not address the issue.

[1] Excerpts of Record 41 (Ninth Circuit no. 01-55487) (Appeal II) ("ER"), Appellant's Opening Brief at 57-59 (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Reply/Answering Brief of Favish at 10-11 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

[2] Appellant's Opening Brief at 46-57 (Ninth Circuit no. 01-55487) (Appeal II) (filed May 30, 2001), Reply/Answering Brief of Favish at 2-4 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

Appendix to Petitioner's Petition for Certiorari 1a-2a ("Pet. App.").

Prior to the decision in Appeal II, by letter dated February 22, 2002, the OIC's appellate attorney, Robert M. Loeb of the Department of Justice, told the Clerk of the Ninth Circuit that he is enclosing, under seal, color copies of the 10 photos for the court's *ex parte* in camera review in response to the Ninth Circuit's instructions, and that the OIC will bring the original photos to the oral argument for the court's inspection pursuant to the court's instructions. The Ninth Circuit requested the photos on February 20, 2002. Joint Appendix 20 ("J.A."). Mr. Loeb's letter was filed February 25, 2002. J.A. 20. Oral argument in Appeal II never occurred. J.A. 20. The original Polaroid photos were never produced to the Ninth Circuit. When Judge Pregerson refers to "the ten photographs at issue" and states that he "personally viewed the ten photographs" (Pet. App. 2a), that statement should not be construed to mean that the Ninth Circuit viewed the original photos.

On July 12, 2000, in deciding Appeal I, the Ninth Circuit reversed and remanded, and ordered the district court to view the photos *in camera*. Pet. App. 13a-14a. Based on its interpretation of the FOIA's "personal privacy" exemption (5 U.S.C. § 552(b)(7)(C)), the Ninth Circuit ordered the district court to balance the "public purpose to be served by disclosure" against the degree to which disclosure would "violate" the "memory of the deceased loved one" held by "a spouse, a parent, a child, a brother or a sister" or constitute an "invasion" of "the survivor's memory of the beloved dead." Pet. App. 13a. The Ninth Circuit stated: "The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead." Pet. App. 13a. The Ninth Circuit also stated that the district court was to "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." Pet. App. 14a.

Unlike Lisa Foster Moody and Sheila Foster Anthony, Foster's other sister, Sharon Bowman, and his three adult children, did not intervene in this action. ER 298, 363, 612, 615.

SUMMARY OF ARGUMENT

Foster's family members have no privacy interest in the photos. If any such privacy interest is found, it is outweighed by the public's interest in disclosure. The photos will help the public determine how the government investigated and reported on this death. Redaction of the photos must be considered if any portion of a photo is to be withheld. In order to ensure that the courts are shown the original pristine versions of the photos *in camera*, deposition testimony should be taken from Miquel Rodriguez and his former assistant.

ARGUMENT

1. This Court's Precedents And Congressional Intent Establish That Foster's Survivors Have No Privacy Interest In The Photos

The OIC begins its argument by misstating the analysis that is required when determining whether documents may be withheld pursuant to Exemption 7(C). The OIC states that after a determination that the documents at issue are law enforcement records, "the applicability of Exemption 7(C) turns upon weighing the public interest in disclosure of the documents against the invasion of privacy that disclosure would cause." Brief for the Petitioner 14 ("Pet. Br."). Contrary to the OIC's statement, before any weighing occurs, it must first be determined whether there is a privacy interest to be weighed. In the present case there is no privacy interest to be weighed, and therefore, no weighing is required.

This Court has held: "Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 569 n.27 (1990). Therefore, the correct interpretation of the word "privacy" as used in the

FOIA's Exemption 7(C) begins and ends with the intent of those who drafted it in 1966 and 1974. What Congress meant by that word is the central issue. The preferences of judges and litigants about whether "privacy" means something other than what it meant to the FOIA's drafters or whether there should be a FOIA exemption for "emotional distress," are immaterial. Moreover, this Court has held that to ensure maximum disclosure, the FOIA's exemptions should be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

By imposing a definition of "privacy" as used in Exemption 7(C) that deviates from the intent of the Congress that created it, the Ninth Circuit violated the basic rule of statutory construction and has significantly eroded the FOIA. There are two reasons why this Court should protect the FOIA by striking down the Ninth Circuit's new definition of "privacy". First, as used in the Exemption, "privacy" only means the right to control information about oneself. The disputed photos do not contain any information about Foster's surviving family members. Therefore, the exemption is inapplicable to this case. Secondly, the new definition contradicts the primary purpose of the FOIA. By stating that "intrusion of the media would constitute invasion" of the survivors' memory of the deceased (Pet. App. 13a), the Ninth Circuit allows the Government to withhold information that in many cases will be the most deserving of disclosure because it reveals Government corruption or negligence, and therefore will attract media attention.

Interpreting the word "privacy" as used in Exemption 7(C), this Court held that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *Department of Justice v. Reporters Committee*, 489 U.S. 749, 762-63, 764 n.16 (1989). The legislative history of the FOIA supports that definition and no other.

"Privacy" did not originally appear in Exemption (7)(C) when the FOIA was enacted in 1966.[3] The word was added to Exemption (7)(C) when the FOIA was amended in 1974.[4] The word originally was used in Exemption 6, which continues to state: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ."[5]

Except for the omission of "clearly", the language of Exemption 7(C) is the same as that contained in the original FOIA for Exemption 6, the exemption for personnel, medical and similar files. There is no reason to believe that when Congress added "privacy" to Exemption 7(C) in 1974 it meant for the word to have a different meaning than it did when the word was used in Exemption 6 in 1966. Therefore, the definition of the word "privacy" that Congress intended in 1966 when it used the word in Exemption 6 is the definition that Congress intended for the word as used in 1974's amendment of Exemption 7.

The legislative history of Exemption 6 establishes that Congress intended "privacy" to mean the right of a person to control information about himself. A United States Senate report on a bill that led to the FOIA states:

> Exception No. 6 relates to "clearly unwarranted invasion of personal privacy." In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all

[3] 5 U.S.C. § 552(b)(7)(C). The original FOIA is set forth in Staff of Senate Comm. on the Judiciary, Subcommittee on Administrative Practice and Procedure, The Freedom of Information Act (Ten Months Review), 90th Cong., 4 (Comm. Print 1968).

[4] Attorney General's 1974 FOI Amendments Memorandum (1975), *at* http://www.usdoj.gov/04foia/74agmemo.htm#exemption7 (last visited July 20, 2003).

[5] 5 U.S.C. § 552(b)(6); The Freedom of Information Act (Ten Months Review), *supra* n.3, at 4.

> such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."
>
> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those government agencies where persons are forced to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

S. Rept. No. 88-1219, at 7 (1964).

The Congressional debate of the FOIA in 1966 establishes that "privacy" was intended to mean the right of a person to control information about himself. One proponent of the FOIA stated:

> We have labored long and hard to establish firmly the premise that the public has not only the right but the need to know. We have also accepted the fact that the individual is entitled to respect for his right of privacy. The question arises as to how far we are able to extend the right to know doctrine before the inevitable collision with the right of the individual to the enjoyment of confidentiality and privacy. Subsection (b) attempts to resolve this conflict by allowing federal agencies to delete *personally identifying details* from publicly inspected opinion,

> policy statements, policy interpretations, staff manuals, or instructions in order "to prevent a clearly unwarranted invasion of personal privacy." Should agencies delete *personal identifications* that cannot reasonably be shown to have direct relationship to the general public interest, they must justify in writing the reasons for their actions. This "in writing" qualification is incorporated to prevent the "invasion of privacy clause" *from being distorted* and used as a broad shield for unnecessary secrecy.

112 Cong. Rec. 13645 (1966) (remarks of Rep. King) (emphasis added).

Consistent with the legislative history of "privacy" as used in Exemption 6, Attorney General Levi's discussion of "privacy" as used in Exemption 7(C) in 1974, was predicated on "privacy" being a protection of "information about an individual" and "information about a person" without any other definition of "privacy" being advanced. *See* Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4.

The Senate Report on a bill that led to the FOIA expresses the importance of having exemptions to disclosure that are clearly delineated so as to prevent the Government from expanding the exemptions beyond what Congress intended. The Senate Report states:

> Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," "required for good cause to be held

> confidential," and "properly and directly concerned."
>
> It is the purpose of the present bill (S. 1666) to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language* and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is essential that agency personnel, and the courts as well, be given *definitive guidelines* in setting information policies. Standards such as "for good cause" are certainly not sufficient.

S. Rept. 88-1219 at 8 (emphasis added).

Another House Member described the importance of having exemptions that have "workable standards":

> . . . The bill would set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "in the public interest," and "internal management" with *specific definitions* of information which may be withheld.

112 Cong. Rec. 13642 (1966) (remarks of Rep. Moss) (emphasis added).

Therefore, non-legislative expansion of the definition of "privacy" beyond what Congress intended constitutes a violation of Congressional intent that the exemption be "clearly delineated" and "specific" so that the Government would not withhold information that should be released. Congress' definition of "privacy" as the right of a person to control information about oneself is a clearly delineated, specific definition. The definition invented by the Ninth Circuit in this case and supported by the OIC and Foster's widow and sister, and all other definitions that deviate from what Congress intended, are not "clearly delineated" or

"specific" and are not "workable". Such definitions lend themselves to the exact sort of abuse that Congress sought to end with the 1966 FOIA. Therefore, such definitions not only violate the intent of Congress regarding the definition of "privacy", but also violate Congress' intent to eliminate vague and unworkable definitions in the exemptions that can be misused by the Government.

In *Reporters Committee*, this Court expressly described only two definitions of "privacy" and neither of them was a broad right to have one's memory of a deceased family member protected. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 762 (citation omitted). This first interest is classic privacy, which Charles Fried explained in his seminal law review article as "control over knowledge about oneself." Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968) (quoted in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 n.5 (3d Cir. 1980)). Fried also explained that privacy is best thought of as a subcategory of the broader interest in personal liberty: "Most obviously, privacy in its dimension of control over information is an aspect of personal liberty." *Reporters Committee*, 489 U.S. at 762. Thus, with liberty being the freedom to do things without interference, privacy is the more specific freedom to do a particular thing: control information about oneself.

When discussing this first privacy interest, this Court quoted many authorities for support of the central proposition that privacy encompasses "the individual's control of information concerning his or her person." *Id.* at 763. These quotes include: "Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure." *Id.* at 763 n.14 (quoting Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 Law & Contemporary Problems 342, 343-44 (1966)). "The common law secures to each

individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them." *Reporters Committee*, 489 U.S. at 763 n.15 (quoting Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890-1891)). Information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *Reporters Committee*, 489 U.S. at 763-64 (quoting Webster's Third New International Dictionary 1804 (1976)). "Privacy . . . is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting A. Breckenridge, *The Right to Privacy* 1 (1970)). "Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting A. Westin, *Privacy and Freedom* 7 (1967)). "The right of privacy is the right to control the flow of information concerning the details of one's individuality." *Reporters Committee*, 489 U.S. at 764 n.16 (quoting Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1225 (1974-1975)).

In *Reporters Committee* this Court made it extremely clear that "privacy", as that word was used by Congress in Exemption 7(C), is the right to control information about oneself and there is no support in this Court's cases for "privacy" being a right to be free from emotional distress or a right to have one's memory of a deceased family member protected from violation by media intrusion or otherwise.

The second type of privacy interest discussed in *Reporters Committee*, the interest in independence in making certain kinds of important decisions, is part of a more broadly based liberty interest that should not be described as privacy.

This became clearer when subsequent to *Reporters Committee*, this Court endorsed the proposition that the right to refuse medical care is an aspect of liberty, rather than the more narrow subpart of the liberty interest known as privacy: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 n.7 (1990) (citation omitted). This Court also recently relied on the Fourteenth Amendment liberty interest, not privacy, in *Lawrence v. Texas*, 156 L. Ed. 2d 508 (2003), in striking down a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

However, the debate over whether the freedom to do things like get an abortion, engage in certain sexual conduct, or refuse medical care, are correctly described as aspects of privacy or are better described as part of a more general liberty interest, is not essential to resolution of the present issue. The important point is that this Court in *Reporters Committee* described privacy as the right to control information about oneself and did not describe it as a broad interest in having one's memory of a deceased family member protected, from media intrusion or otherwise, or as a broad interest in freedom from emotional distress. Not only would such a broad definition of "privacy" conflict with the FOIA's basic purpose of providing a check on government corruption and negligence, as explained below, it would render the word useless since it would subsume anything that "violates" a person's memory of a deceased family member.

There is another reason why the Ninth Circuit's expansive new definition deviates from the definition of "privacy" as intended by Congress in 1966 and 1974. According to this Court, the central purpose of the FOIA is to give ordinary citizens the power to keep the Government honest in order to preserve our constitutional democracy.

Reporters Committee, 489 U.S. at 772-75. As one court explained:

> For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.

Stern v. F.B.I., 737 F.2d 84, 92 (D.C. Cir. 1984).

According to this Court:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

However, in contravention of this Court's command to construe the FOIA's exemptions narrowly, *see Dep't of the Air Force*, 425 U.S. at 360-61, the Ninth Circuit has construed "privacy" as used in Exemption 7(C) *expansively* to allow government agencies and the courts to withhold information under the FOIA when its disclosure would "violate" a person's memory of a deceased family member, perhaps by causing the media to contact the surviving family member. Pet. App. 13a. Especially in a death case, the more the documents indicate the possibility of government corruption or negligence, the more likely it is that the media will take action that may affect the survivors' memories of the deceased if the records are disclosed. Therefore, under the Ninth Circuit's new definition, the greater the possibility that disclosure of the records will reveal government corruption or negligence, thereby fulfilling the purpose of the FOIA, the greater the reason to keep the documents from the public! This result is inconsistent with the FOIA. There is no evidence in the legislative history of the FOIA indicating that

Congress intended that the documents in a government death investigation most revealing of possible government corruption or negligence are the documents that deserve the most protection from public disclosure because they also would be the documents most likely to cause the media to affect the survivors' memories of the deceased.

The OIC tries to support its position with the following citation: "*Department of State v. Ray*, 502 U.S. 164, 176 (1991) (privacy interest includes embarrassment that disclosure could cause for returned Haitian nationals "or their families")." Pet. Br. 18; *see also id.* at 24. However, in *Ray*, this Court was discussing a FOIA request for the "unredacted interview summaries" of the government's interviews with Haitian refugees that the government had returned to Haiti. *Ray*, 502 U.S. at 168, 176. In addition to the summaries, "the names and addresses of the interviewees" were sought along with "highly personal information regarding marital and employment status, children, living conditions, and attempts to enter the United States . . . ." *Id.* at 175. Thus, the records sought included information about the interviewees' families, not only the interviewees. Therefore, this Court's comment about "embarrassment" to the families was based on the fact that the records sought in that case contained information about the families. There was no holding in *Ray* that a person has a privacy interest in a record that contains no information about that person.

The OIC states that in *Reporters Committee* this "Court explained that the privacy interests protected by FOIA are more expansive than tort-law or constitutional conceptions of privacy. *Id.* at 762 n.13 . . . ." Pet. Br. 19; *see also id.* at 24. However, footnote 13 in *Reporters Committee* does not support the OIC's statement. Instead, that footnote states: "The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." (Citations omitted.) The footnote is consistent

with the opinion's holding that privacy, as used in Exemption 7(C) of the FOIA, is the right of a person to control information about himself.

The OIC tries to support its position with quotes from the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act. Pet. Br. 18. When those quotes are analyzed in context, they do not support the OIC's position. The Memorandum states:

> The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any [other] person mentioned in the requested file." (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) In appropriate situations, clause (C) also protects relatives or descendants of such persons.
>
> While neither the legislative history nor the terms of the Act and the 1974 Amendments comprehensively specify what information about an individual may be deemed to involve a privacy interest, cases under the sixth exemption have recognized, for example, that a person's home address can qualify. It is thus clear that the privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family.

Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4.

The OIC states:

> Even when Congress narrowed Exemption 7's scope in 1974 by identifying particular

> categories of information for withholding, the reference to personal privacy in Exemption 7(C) was understood to "protect[] relatives or descendants of" persons under investigation, and to factor into the withholding decision the "possible adverse effects upon [the individual] or his family." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (Feb. 1975). . . .

Pet. Br. 18.

The 1974 Attorney General's Memorandum states that "relatives or descendants of" "the subject of the investigation and 'any [other] person mentioned in the requested file' are protected "[i]n appropriate situations". The Memorandum does not specify what those "appropriate situations" are. Just as with the legislative history of the FOIA, there is nothing in the Memorandum to support the proposition that such an "appropriate situation" is one where there is no information in the subject record about the relative or descendant who is alleged to have a privacy interest in the record.

Contrary to the OIC's position, the most rational interpretation of the Memorandum is that the Attorney General's reference to "appropriate situations" is to situations where the record does not mention the relative or descendant of the subject of the investigation, but still contains information about the relative or descendant that can be associated with that relative or descendant. For example, if the record contained medical information about the subject of the investigation stating that the subject of the investigation had a genetic disorder that will be passed to the subject's future children, this would involve the privacy of such future children even though they are not mentioned in the record. Another example would be where the record does not mention the subject of the investigation's wife, but the record states that the subject of the investigation has a sexually transmitted disease. This would involve the wife's privacy

because the information in the record indicates that she was exposed to a sexually transmitted disease.

The Attorney General did not cite any legislative history or any other authority to support his statement regarding relatives and descendants. Therefore, the most rational interpretation of his statement is that he intended it to be consistent with the legislative history of the FOIA.

The same is true for the Attorney General's sentence about an individual's family: "Rather, in the present context it [Exemption 7(C)'s right of privacy] must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family." Attorney General's 1974 FOI Amendments Memorandum, *supra* n.4. This part of the Attorney General's Memorandum states that Exemption 7(C)'s privacy interest includes "information about an individual *which he could reasonably assert an option to withhold*", which, if disclosed, can have "possible adverse effects upon" that individual's "family." In this sentence, the Attorney General was discussing the right of an individual to assert a privacy interest in a record that contains information about that individual. The Attorney General did not state that a family member of the subject of a record has a privacy interest in that record when the record contains no information about that family member.

The OIC tries to support its position with this argument: "Indeed, since FOIA's enactment, the privacy exemptions have been understood to "includ[e] members of the family of the person to whom the information pertains." 1967 Attorney General Mem. 36." Pet. Br. 18. The full quote from the 1967 Attorney General Memorandum is:

> It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would

> amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains.

Attorney General's Memorandum On The Public Information Section Of The Administrative Procedure Act (1967), *at* http://www.usdoj.gov/04foia/67agmemo.htm (last visited July 20, 2003).

The critical issue is what the Congress understood the privacy exemptions to mean in 1966 and 1974 when it enacted those exemptions. On this critical issue, the 1967 Attorney General's Memorandum is silent because it offers no legislative history to support its statement about "including members of the family of the person to whom the information pertains." To the extent that the 1967 Attorney General's Memorandum conflicts with the legislative history of the FOIA, it should be rejected as incorrect.

The OIC cites case law and statutes from various states that restrict public access to photos of dead bodies under state freedom of information acts. Pet. Br. 24-27. Those cases and statutes are immaterial to the present case because they do not involve the definition of privacy as used in the FOIA, as intended by Congress in 1966 and 1974. Moreover, with regard to the various state statutes, they illustrate the point that if Foster's survivors and the OIC do not want the photos released to the public, they should urge Congress to amend the FOIA to add another exemption that will cover the present situation. Urging Congress to change the law is preferable over urging the courts and government agencies to misinterpret the law, as several lower federal courts have done on this issue.

The citation to *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980) (Brief for Respondents Sheila Foster Anthony and Lisa Foster Moody in Support of Petitioner 24 ("Supporting Res. Br."), is not on point because it appears that the records in that case included information

about the family members and associates whose privacy was being protected.

2. The Public's Interest In Disclosure Outweighs Any Privacy Interest In The Photos

Assuming that a privacy interest is held to exist in this case, any balancing of that interest favors the public's interest in disclosure of the photos. There are two related areas of the Government's conduct involved in this case that should not be confused with each other. The first is the Government's conduct in investigating Foster's death. The second area is the Government's conduct in reporting the facts of the death and the investigation to the public, primarily in the Fiske and Starr reports.

The photos at issue in this case are directly relevant to both areas. For example, if the photos contain evidence that is inconsistent with suicide in the park, then the photos will establish that the Government's investigation was fundamentally flawed, either through negligence, intentional misdeeds, or a combination thereof. If the photos contain evidence that is consistent with suicide in the park, then the photos could establish that the Government's investigation reached the correct conclusion.

Likewise, if the photos contain evidence that is inconsistent with suicide in the park, then the photos will establish that the Government's reports to the public were fundamentally flawed. If the photos contain evidence that is consistent with suicide in the park, then the photos could establish that the Government's reports to the public reached the correct conclusion, despite their undisputed significant omissions and other deceptive tactics.

The problem facing the public is that the Fiske and Starr reports are so demonstrably untrustworthy that the public has no factual basis for concluding that it was suicide in the park. Based on the publicly available evidence, it cannot be proven to a certainty that the Government's investigation reached the wrong conclusion. However, it has been proven to a certainty

that the Fiske and Starr reports are deceptive and untrustworthy.

Under the FOIA's balancing process for Exemption 7(C), Favish does not have to prove that the Government's investigations reached the wrong conclusion in order to outweigh the asserted privacy interest. The public's interest in disclosure outweighs the asserted privacy interest because the Government's reports are demonstrably untrustworthy. Once the Government reports are shown to be untrustworthy, it becomes necessary for the public to see the raw evidence for itself because it cannot trust the Government to accurately and completely report on that evidence to the public. This case is a textbook example of the reason that the FOIA was enacted.

The Ninth Circuit held that "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts" about the government's conclusion of suicide in the park. Pet. App. 11a. Although the Ninth Circuit stated "if believed," it should be emphasized that none of the evidence depends upon Favish's credibility because the evidence consists almost entirely of the government's own documents.

The number of government investigations and reports is not as important as the demonstrable credibility, or lack of credibility, of those investigations and reports. The OIC argues as if the credibility of the Government investigations is irrelevant. Under the OIC's view, it is difficult to see why there is any need for the FOIA at all because if the Government has conducted several investigations, no matter how demonstrably untrustworthy, the public has no need to see any of the hidden evidence. The OIC's view is contrary to the purpose of the FOIA.

a. Starr Concealed The Lack Of Blood Spatter

The evidence does not show what one would expect from a .38 caliber high-velocity gunshot into the mouth: massive amounts of blood coming out of the nose and mouth, broken teeth from the recoil of the gun, a significant hole in

the back of the head with lots of blood, brain and bone spatter on the surrounding area.

To the contrary, a United States Park Police officer who examined Foster's body at the park testified that he saw a "pool of blood under his head, gun in his right hand, appeared to be a .38 caliber revolver, no sign of a struggle, no other obvious signs of trauma to the body." ER 105, 109. This same officer reported that there "was no blood spatter on the plants or trees surrounding decedent's head" (ER 153) and testified that he did not observe any "blowout" from the back of the head (ER 105, 109). Additionally, a Federal Bureau of Investigation report of its interview with the only medical doctor to view Foster's body at the park says, "no blood was recalled on the vegetation around the body." ER 150. *Starr omits these observations from his report.* This omission is important because it concealed from the three-judge panel to which Starr reported and the public, significant evidence that the alleged suicide shot was not fired at the death scene. The omission also enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

b. Starr Concealed Evidence That Initially There Was No Gun In Foster's Hand

Although the official government story holds that Foster was found with a gun in his hand, the first person that officially found Foster's body said that there was no gun in his hand. This witness, known as the "confidential witness," testified that Foster's hands were palms-up and empty. ER 168-69. In concluding that this witness "simply did not see the gun that was in Mr. Foster's hand," Starr cited the witness' FBI interview in which the witness said that it was possible there was a gun at the back of Foster's hand that he might have missed. ER 277, 358.

But Starr failed to tell the public that one of the body site photos shows a gun in Foster's right hand that eliminates the possibility of there having been a gun at the back of Foster's hand that went unseen by the witness. This photo, leaked to

ABC-TV and published in Time and Newsweek magazine, shows Foster's gun-hand palm down (ER 178-179), while the witness said the hand was palm-up and empty. ER 168-169. This photo shows the gun underneath the palm of Foster's right hand with the back of Foster's hand facing up. ER 178-179. *The gun is in a position where the witness could not have missed it if it was there when he saw Foster's hand.* This means that the only possible condition, which the witness agreed would account for his not seeing the gun, *is a condition that did not occur*. This omission by Starr is important because it concealed from the three-judge panel and the public significant evidence that the gun was not in Foster's hand when he died. The omission enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence and helped to unfairly discredit the witness.

Starr also failed to tell the public the following: The witness testified that his concession that he could have missed seeing the gun was based on the FBI's representation that Foster's hands were palms-up with the gun concealed on the other side of Foster's hand. ER 168-169. The witness further testified that the FBI would not show him the photo. ER 168-170. But when he subsequently saw the photo he testified that it was not a picture of what he saw. ER 168-170. Therefore, Starr failed to tell the public that he relied upon a statement by the witness that the witness later testified was based on a false representation by the FBI.

c. Fiske And Starr Used An Invalid Gun Identification

Identification of the gun was a major problem for the Government. Starr failed to tell the public that an invalid gun identification from Foster's widow, Ms. Moody, was used by his predecessor, Robert Fiske, who also issued a report on the death. Nine days after the death, according to the Park Police, they showed Ms. Moody a photo of the official death gun (ER 277, 362), which is blued steel and appears black (ER 178-179). Ms. Moody reportedly said she could not identify

the gun because it was not silver and did not have a large barrel. ER 277, 362, 156. The FBI said that ten months later, in May 1994, it showed Ms. Moody the actual official death gun, not a photo of the gun, and she "believes that the gun found at Fort Marcy Park may be the silver gun which she brought up with her" from Arkansas. ER 147-149. Referring to this reported inspection of the actual gun, Fiske then reported, *without stating the gun colors*, that Ms. Moody "stated that the gun looked similar to one that" Foster owned.[6] ER 89, 92.

Fiske's use of Ms. Moody's statement clearly was deceptive. If she was shown the black official death gun at this May 1994 interview and *simultaneously* identified it as being silver-colored, then she failed to give a valid identification of the black official death gun. Likewise, if she was shown a silver-colored gun at this interview, then she failed to give a valid identification of the black official death gun. No matter what color gun Ms. Moody was shown at this interview, given her reported response, it was deceptive for Fiske to use her response as if it were a valid identification of the black official death gun.

Starr failed to explain why Fiske used Ms. Moody's invalid gun identification. Starr also failed to explain why, if Ms. Moody was shown the black official death gun in May 1994, she reportedly *simultaneously* described it as silver, without any report of the FBI agents or attorneys present saying anything about such a bizarre response.

By only reading the Starr Report, one would not know that Ms. Moody's May 1994 "identification" was invalid. This is because Starr failed to tell the public that Ms. Moody's reason for not identifying the gun in the photo

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[6] In 1998 the district court ordered the OIC to release color copies of photos of the official death gun. Now the public and this Court can see for itself if the gun is one that somebody would describe as silver as it was being shown to them. Two of the color photos of the gun released by the OIC are at Favish's web site, *at* http://www.allanfavish.com/photoix.htm (last visited July 20, 2003).

shown to her nine days after the death was because it was not silver. Also absent from Starr's report is that the FBI expressly stated that Ms. Moody believed the gun shown to her in May 1994 was silver.

The effect of Starr's omissions are to obscure the possibility that Ms. Moody was deliberately shown the wrong gun – a silver gun – in May 1994 so that there would be something in the record that could be presented as a Foster family member's "identification" of a gun, without telling the public that she had identified a gun that was not found with the body.

Starr failed to explain why Ms. Moody reportedly identified a black gun as silver, *as it was being shown to her*, in May 1994. If her description of the gun *as it was being shown to her* during the 1994 interview was erroneous, her error cannot be explained by a faulty memory. Her perception at that interview had nothing to do with memory. She was reporting her perception of a gun as it was being shown to her during the interview. Any such erroneous description only can be explained by Ms. Moody lacking an ability to tell black from silver, her lying during the interview about her perception or the FBI agent failing to accurately report what Ms. Moody said at the interview.

There is no evidence in the public record that Ms. Moody is unable to tell black from silver, that she lied about her perception or that the FBI failed to accurately record what Ms. Moody said. Moreover, had she lied about her perception of the gun *as it was being shown to her*, characterizing a black gun as silver, this should have elicited comment from those present. No such comment appears in the public record.

Starr came closest to explaining these issues when he stated that in November 1995, Ms. Moody identified "the gun recovered from Mr. Foster's hand ... although she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington." ER 277, 362-63. Thus, Starr implied that there never was a

silver gun and for some unexplained reason, Ms. Moody just thought all these years that a black gun in her home was silver!

But Starr's implication that Ms. Moody has a faulty memory about the color of the gun she and her husband owned is an inadequate explanation. Starr completely failed to explain how it is possible that Ms. Moody could have been shown a black gun in May 1994 that she reportedly *simultaneously* described as silver. Again, her reported description at the May 1994 interview was not dependent on any memory of what a gun looked like when she saw it in the past. It was dependent on her ability to describe what she was being shown at the time of her description.

If she was shown a black gun at this interview, the OIC must explain why Fiske's Deputy, Roderick Lankler and Ms. Moody's attorney, James Hamilton (who represents her in the present case) and at least two FBI agents, apparently failed to note that in their presence, Ms. Moody described a black gun as being silver. The OIC also must explain why Fiske used that identification as if it were a valid identification.

Now we get into the realm of informed speculation in order to try to make sense of the known facts. Starr's failure to explain these matters suggests that the more sinister explanation is true: At the May 1994 interview, Ms. Moody correctly described the color of the gun she was shown at that interview. This is because the gun shown to her at that interview was silver and it was not the black official death gun. She deceptively was shown a silver gun it was known she could recognize so that there would be something in the record that could be presented as an "identification" of the black official death gun. Recall that nine days after the death, according to the Park Police, they showed her a photo of the official death gun (ER 277, 362), which is blued steel and appears black (ER 178-79). She reportedly said she could not identify the gun because it was not silver and did not have a large barrel. ER 277, 362, 156.

According to Starr's report, Ms. Moody "stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found . . . ." ER 277, 362. However, this does not explain why Ms. Moody would have described a black gun that was shown to her in May 1994 as silver, *as it was being shown to her*. Moreover, a verbatim transcript of this November 1995 interview is not public and therefore cannot be evaluated properly.

Even if Ms. Moody's November 1995 interview provided a rational explanation, which it doesn't, Starr's report, failed to explain why it was proper for Fiske to use Ms. Moody's May 1994 "identification" as if it were a valid identification of the black official death gun. Obviously, Fiske, writing in 1994, did not have the November 1995 interview.

This is not mere insignificant "confusion" about the gun identification. It is conclusive proof that Fiske used an invalid "identification" from Ms. Moody as if it were valid and Starr's report did nothing to dispel that fact and instead gave an irrational explanation.

It also should be noted that Fiske and Starr failed to reconcile Ms. Moody's other reason for her initial failure to identify the black official death gun, i.e., because it didn't have a "large barrel" (ER 156) with their conclusion that she has identified it, despite the fact that it does not have a large barrel.[7]

These omissions by Fiske and Starr are important because they concealed from the three-judge panel and the public significant evidence that the gun allegedly found with Foster was not previously in his possession, as alleged by the Government. The omissions also enabled Fiske and Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

[7] *See* Favish's web site, *supra* n.6.

d. Fiske And Starr Failed To Report That The Park Police Chief Made A False Statement About Alleged Identification Of The Gun

At a press conference on August 10, 1993, Robert Langston, then Chief of the U.S. Park Police, told the public that the Foster family had identified the official death gun as one of Foster's guns. ER 166-67. But that statement was false at the time it was made (and has never been proven true). The press conference was given by Philip B. Heymann, then Deputy Attorney General, Robert Bryant, then Special Agent in Charge of the Washington, D.C., Metropolitan Field Office of the FBI[8] and Chief Langston. ER 166-67.

By the time of the press conference, Ms. Moody had not identified the black official death gun, in part because it was the wrong color: ER 156.

By the time of the press conference, one of Foster's sisters, Sharon Bowman, failed to give a credible identification of the official death gun. ER 155, 158. The person who showed Bowman the photo of the gun wrote: "I asked if she remembered any other features [other than the wavelike detailing at the base of the grip]. She did not." ER 155, 158. So as far as Langston knew on August 10, 1993, Bowman did not even remember the color of the gun as a feature she remembered seeing. A gun "identification" that does not include the color of the gun is not an identification. Naturally, both Starr and Fiske failed to state this additional portion of Bowman's "identification" of the black official death gun.

[8] Robert Bryant was subsequently promoted to Deputy Director of the FBI, the No. 2 post in the agency. *See* Tammy M. Smith, *FBI Selects Deputy Director*, Sun Herald (Biloxi, Miss.), Oct. 2, 1997, at A3 (ER 180). Contrary to popular belief, FBI involvement in the original investigation was substantial: "There came a time when I determined that they [DOJ & FBI] were calling a lot of shots, setting up a lot of protocols." ER 124-26 (Deposition of Robert H. Hines, Commander of United States Park Police Office of Special Services).

By Aug. 10, 1993, *nobody* in the Foster family identified the black official death gun as one previously belonging to Foster. Indeed, Fiske and Starr failed to tell the public that largely because of its color, the black official death gun could not be identified by Foster's nephew, who was the surviving family member most familiar with the family's guns. ER 151-52.

Moreover, even if Bowman's statements legitimately can be characterized as an "identification," they are the only possible justification for Langston's statement. Ms. Moody had not identified it by August 10, 1993, and had in fact rejected it as being one of Foster's guns because it was not silver with a large barrel. ER 156. The surviving family member most familiar with the family's guns, Foster's nephew, could not identify the black official death gun, primarily because of its color. ER 151-52. Under these circumstances, Langston was unjustified in telling the public that the "family" thought the gun had been in Foster's possession. Starr and Fiske failed to explain why Chief Langston made this false statement. Fiske and Starr let him get away with it and the OIC defends it to this day.

e. Fiske And Starr Failed To Report Important Information About The Haut Report

Starr's discussion of the medical evidence also is deceptive. The official government story says there was no neck wound and that Foster shot himself in the mouth, leaving a one by one and a quarter inch exit hole in the back of the head, three inches from the top. ER 277, 311-12, 314. Starr dismisses a report by one of the paramedics that there was a small bullet-like entrance wound on the right side of Foster's neck. ER 277, 315.

But the only medical doctor to view Foster's body at the park, Dr. Donald Haut, wrote a two-page report that is internally inconsistent. ER 632-35. On the first page it states that the death shot was "mouth-head" (ER 634), but on the second page it states that the death shot was "mouth to neck" (ER 635). Moreover, the report appears to have been

improperly altered. On page one there is a section near the bottom of the page on the left side that states:

CAUSE OF DEATH:
PERFORATING GUNSHOT WOUND MOUTH-
HEAD

ER 634.

However, just to the left of the word "HEAD" there appears to be remnants of a four-letter word that was mostly concealed with correction fluid or tape. ER 634.

Both Fiske and Starr failed to tell the public all the important facts about this medical report. Fiske completely ignored it and Starr quoted from the apparently altered language, while failing to tell the public about the apparent alteration, and about the unaltered language mentioning a neck wound. ER 277, 308. Starr also failed to explain why the report appears to be altered and what, if anything, is written underneath the apparent alteration.[9]

f. Starr Misled The Public About Police Observance Of The Autopsy

The medical evidence was further distorted because Starr falsely implied that the Park Police observed the entire autopsy when they did not do so. Starr reported that several Park Police officers observed the autopsy, and quoted one of the officers who wrote that after he briefed the autopsy doctor, the doctor "started the autopsy." ER 277, 309. But Starr failed to tell the public that the next sentence in the officer's report states: "Prior to our arrival, the victim's tongue had been removed as well as parts of the soft tissue from the soft pallet (sic)." ER 154. Starr's omission is significant given that this is an autopsy of a man who allegedly fired a gun into his mouth while leaving behind unresolved questions about a right-side neck wound whose track might have gone through the tongue and soft palate.

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[9] *See* pages 34-35 for developments that may explain why Starr did not comment on the apparent alteration.

Additionally, Starr failed to tell the public that the autopsy doctor violated policy by beginning the autopsy before the police arrived (ER 115, 117-18) and that the autopsy doctor refused to tell the police the identity of his assistant. ER 134-35.

These omissions are important because they concealed from the three-judge panel and the public significant evidence that raises legitimate questions about the reliability of the autopsy. The natural inclination of the three-judge panel and the public is to assume that the autopsy was legitimately performed and cannot be questioned. Omitting contrary evidence gave the three-judge panel and the public a false impression that there were no legitimate questions about the propriety of the autopsy. The omissions also enabled Fiske and Starr to avoid having to explain why the autopsy doctor violated policy by beginning the autopsy before the police arrived and why he removed such crucial areas of Foster's body before the police arrived and why he refused to tell the police the identity of his assistant.

g. Starr Failed To Report Evidence That Foster's Car Was Not At The Park Shortly After The Death

Starr also omitted important evidence about Foster's arrival at the park. Starr discussed four people who were in the park between 4:30 p.m., and just before 6:00 p.m., at a time when Foster was probably already dead (ER 154, 89-90, 57, 124-26, 128, 130, 105, 107-08), and his gray car (ER 277, 299, 302, 307, 349) should have been in the park's parking lot. Starr stated that one of these people reported seeing a brown car, not Foster's gray car. ER 277, 302. But Starr failed to state that the other three people also reported seeing a brown car, not Foster's gray car. ER 137-43, 168, 172. Yet, Starr inexplicably concluded that Foster's gray car was in the lot at this time. ER 277, 307, 349.

All four of these witnesses reported seeing a brown car, not Foster's gray car, and Starr only told the public that one of these witnesses reported seeing a brown car. Starr failed to

tell the public that the other three witnesses also reported seeing a brown car.

Instead of admitting that this episode alone makes the Starr report untrustworthy, the OIC deceptively tried to make it appear that there is additional support for Starr's conclusion that Foster's gray car was in the parking lot when he died. In its motion in the district court to alter the judgment, the OIC stated that the Starr report "analyzes" the statement of "one citizen who saw a dark metallic grey Japanese sedan (Report at pp. 20-21) . . . ." ER 474, 496. However, the Starr report stated that this citizen "was shown photographs of Mr. Foster's car" and "that the license plate on it differed from that which he recalled." ER 277, 302. Therefore, in its motion to alter the judgment, the OIC implied that this citizen saw Foster's car, but failed to tell the district court that the Starr report itself reports evidence that this citizen did not see Foster's car.

It is significant that in its motion to alter the judgment, the OIC had no defense for one of the Starr report's most misleading statements. In trying to show that there were no suspicious people at the park who may have caused Foster's death, Starr referred to the statements by two of the witnesses who had reported seeing a brown car, not Foster's gray car, and stated that "[a]ccording to the reports of their interviews at the scene on July 20, 1993, C3 and C4 [the two witnesses] did not see anyone in or touching Mr. Foster's car." ER 277, 350. They did not "see anyone in or touching Mr. Foster's car" because, according to their statements, they did not see Mr. Foster's car! But Starr did not tell the public this fact. *Starr's implication that Foster's car was seen by these two witnesses is false.*

In its motion to alter the judgment, citing the Starr report, the OIC stated: "The only non-official cars positively identified and known to law enforcement and the OIC were those of Mr. Foster, and two other citizens." ER 474, 496. This proves nothing. The brown car reported by the four

witnesses and a paramedic[10] was never "positively identified" and made "known to law enforcement and the OIC," because apparently the government deliberately failed to look for the brown car. There is no evidence in the Fiske or Starr reports that the government searched for the brown car reported by all these witnesses.

These omissions by Starr are important because they concealed from the three-judge panel and the public significant evidence that contrary to the Government's story, Foster's car was not at the park when he died, thereby significantly eroding the conclusion of suicide in the park. The omissions also enabled Starr to avoid having to explain how the suicide in the park conclusion is consistent with this evidence.

h. Starr Failed To Report Evidence Refuting Henry Lee's Credibility

At this point you might be comparing Starr's OIC with O.J. Simpson's criminal defense team, and you would have good reason. Starr hired Simpson's discredited expert witness, Dr. Henry Lee.[11] Starr said Lee's examination of Foster's clothes revealed no evidence that Foster's body had been dragged. ER 277, 332, 377. But Starr failed to tell the public that according to the Park Police, they dragged Foster's body when it began to slide down the hill during an examination (ER 105, 109, 111, 146) and Starr failed to reconcile these reports with Lee's apparently erroneous conclusion. The point here is not whether the body was dragged, but Starr's omission of evidence that severely weakens Dr. Lee's credibility.

The OIC's response to this was: "Obviously Favish and Dr. Lee did not use the term 'dragged' in the same context." ER 474, 489. No further explanation was provided. Contrary

[10] Paramedic George Gonzalez, who arrived in the parking lot at 6:10 p.m., wrote within a day that he saw a brown Honda, without reporting any gray car. ER 277, 304, 124-25, 127-29.

[11] *See* Hank M. Goldberg, The Prosecution Responds: An O. J. Simpson Trial Prosecutor Reveals What Really Happened 246-70 (1996).

to the OIC's non-sequitur response, the Park Police reported that Foster's body "was starting to slide down the hill" (ER 109), "began sliding down the hill" (ER 111), "slid down" (ER 111), and was "slipping down the hill" (ER 146) in a "slide" (ER 146), which is why they "pulled him back up" (ER 111).

Starr stated, "examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging." ER 277, 377. Starr said Lee reported, "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants." ER 277, 332. Starr stated, "Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt." ER 277, 332. Therefore, both the Park Police and Lee are talking about the exact same thing: the movement of Foster's body across the ground. Lee found no evidence that it happened and the Park Police stated in testimony and a statement to the FBI that it happened. The OIC refused to provide a decent explanation of why it was appropriate for Starr's report to ignore the Park Police statements and treat Lee's conclusions as if they were valid.

These omissions by Starr are important because they concealed from the three-judge panel and the public significant evidence that Dr. Lee was not as competent and thorough as Starr would like the public and the three-judge panel to believe. The omissions also enabled Starr to avoid having to explain why the three-judge panel and the public should have confidence in Dr. Lee's opinions, given this major error by Dr. Lee.

i. Fiske And Starr Did Not Discuss The FBI Memo That States "No Exit Wound"

Among documents released by the FBI in late March 1998 in another Freedom of Information Act lawsuit,[12] are six pages that are on file in that case as part of the FBI's Memorandum of Points and Authorities in Support of its

[12] *Accuracy in Media v. FBI*, Civil Action No. 97-CV-02107-GK (D.D.C. 1997)

Motion for Summary Judgment, Exhibit A, Bates # 2-4, & 260-62. ER 636-41. Those six pages show the following. Two days after the autopsy, an FBI agent sent a memo to the director of the FBI stating, "Preliminary results include the finding that a .38 caliber revolver, constructed from two different weapons, was fired into the victim's mouth with no exit wound." ER 638, 641. The "no exit wound" phrase directly contradicts Starr, Fiske and the official autopsy report. ER 277, 311-12, 314.

The memo was written by an FBI agent in the Washington, D.C., Metropolitan Field Office to the Acting Director of the FBI, who was Floyd Clarke.[13] A draft of the memo is dated July 22, 1993, two days after the death and one day after the autopsy and had minor corrections made to it. ER 636-638. The final version is date-stamped July 23, 1993. ER 639-641. The memo does not appear to be an impromptu communication because it says it is, "[t]o confirm referenced telcalls, on 7/21/93." ER 636, 639. Thus, apparently it is restating information that was previously communicated by telephone.

Neither Fiske nor Starr mentioned this memo. Nor did they explain the conditions that would make it possible for a .38 revolver to be fired in the mouth without making an exit wound. Also unmentioned is whether the FBI Director did anything to resolve the contradiction between this memo and the official autopsy report of an exit wound. There is no publicly available information indicating that Fiske or Starr ever questioned the FBI agent who wrote this memo or the Acting FBI Director to whom it was sent, about this memo.

These omissions by Fiske and Starr are important because they concealed from the three-judge panel and the public significant evidence that directly contradicts the official Government conclusion about how Foster died. The

[13] William Sessions was fired from his job as FBI Director the day before Foster's death and Louis Freeh was not sworn in as Director until September 1, 1993. ER 642.

omissions also enabled Starr to avoid having to explain how the suicide in the park story is consistent with this evidence.

j. The OIC Has Never Explained Why Its Certified Copy Of The Haut Report Is Different From The Other Certified Copies Of The Haut Report

A copy of the report by Dr. Donald Haut was attached to Favish's motion for summary adjudication of issues that was filed in the district court February 11, 1998. ER 46-47. It is a copy of the Haut Report that was found in the National Archives by non-government researchers Patrick Knowlton and Hugh Sprunt. ER 44-45. At the time, it was the only publicly available version of the Haut Report. This National Archives copy was certified as a true copy on November 2, 1994, by Virginia Assistant Chief Medical Examiner Dr. James C. Beyer, who also was the autopsy doctor for Foster. ER 46, 309. Another copy of that National Archives version of the Haut Report was provided to the district court after the remand in this case. ER 634-35.

In early 2000, before the appellate decision in this case, Favish sued the OIC under the FOIA for its copy of the Haut Report.[14] In response to that lawsuit, the OIC gave Favish a copy of its copy of the Haut Report. A copy of the OIC's copy of the Haut Report that the OIC gave Favish was provided to the district court in this case. ER 643-644. The OIC's copy of the Haut Report was certified as a true copy on January 30, 1995, by Dr. Beyer. ER 643. The certified copy given to the OIC in January 1995 does not contain what appears to be remnants of a four-letter word in the front-page section next to the word "HEAD" as does the National Archives copy. ER 643, 634. Therefore, the answer to the question of why Starr never mentioned the apparent alteration is that the January 30, 1995 certified copy of the Haut Report given by Dr. Beyer to the OIC was free of the "remnants" that are clearly visible on the November 2, 1994 certified copy found in the National Archives. ER 643, 634.

[14] *Favish v. OIC*, Case No. CV 00-00009 CM (C.D.CA 2000).

Also in 2000, Charles Smith, a citizen of Virginia, made a request under the Virginia Freedom of Information Act requesting an opportunity to view the original Haut Report so that he could see if correction fluid or tape had been used on the original and if so, what was underneath any such substance. ER 600. He was not allowed to see the original version of the Haut Report and instead he was provided with copy of the report that was certified as true on March 20, 2000 by the new Assistant Chief Medical Examiner, Frances P. Field. ER 600, 645-50. A copy of this most recently certified copy of the Haut Report, along with the accompanying cover letter and authenticating statements sent to Smith, were presented to the district court in this case. ER 600, 645-50. This March 20, 2000 certified copy of the Haut Report has the apparent alteration on it. ER 646.

Therefore, here are three certified copies of the same document, the Haut Report. One copy that ended up in the National Archives was certified on November 2, 1994. ER 634. The second copy was certified on January 30, 1995 and given to Starr's OIC. ER 643. The third copy was certified on March 20, 2000 and given to Charles Smith. ER 646. The first and third copies contain what appears to be an alteration that is improper. ER 634, 646. Only the second certified copy, the one given to the OIC, fails to show this apparent alteration (ER 643) thereby raising the possibility that the copy given to the OIC was altered further, but done in such a manner as to be a "cleaner" alteration than appears on the other two certified copies.

This is very significant. Any such alteration is highly improper. A leading medical textbook states:

> When you make a mistake on a chart, correct it promptly. Never erase, cover, completely scratch out, or otherwise obscure an erroneous entry because this may imply a coverup . . . Erasures or the use of correction fluid or heavy black ink to obliterate an error are red flags.

> . . . .
>
> When you make a mistake documenting on the medical record, correct it by drawing a single line through it and writing the words "mistaken entry" above or beside it. Follow these words with your initials and the date. If appropriate, briefly explain the necessity for the correction. Make sure that the mistaken entry is still readable. This indicates that you're only trying to correct a mistake, not cover it up.

Mastering Documentation at 304-305 (Springhouse Corp., 2d ed. 1999).

The evidence is consistent with the following scenario. The original Haut Report was improperly altered with correction fluid or tape to conceal a four-letter word and replace it with the word "HEAD". The alteration was imperfect and left remnants of the four-letter word. A copy of that imperfectly altered original was given to the Senate Whitewater Committee and it ended up in the National Archives. About two months later, in January 1995, Starr's OIC was given a copy of the Haut Report by the Virginia Office of Chief Medical Examiner. But this time when a photocopy of the original was made, somebody noticed that the remnants of the improper alteration on the original were visible on the photocopy. This photocopy was altered with correction fluid or tape and another photocopy was made of that version. The result was a "clean" second-generation photocopy that did not show any "remnants" and that copy was certified on January 30, 1995 by Dr. Beyer and given to the OIC. Or Dr. Beyer certified a version that contained the remnants again and somebody at the OIC made the further alteration to clean it up. In any case, in March 2000, a first generation copy was made by the Virginia Office of Chief Medical Examiner showing the remnants, and that copy was given to Charles Smith. Obviously, the truth may be something other than this scenario. But what else is

consistent with the evidence and who is in a position to discover the truth?

Although the Virginia Office of the Chief Medical Examiner will not show the original to Charles Smith, it should show the original to the OIC. However there is no evidence that the OIC has asked to see the original. Apparently the OIC has no interest in learning whether it has been defrauded by the Virginia Office of the Chief Medical Examiner by being given a copy of the Haut Report that was improperly further altered so as to make the alteration completely "clean". Nor does the OIC apparently have an interest in learning whether the Senate Whitewater Committee also was defrauded with an imperfectly altered Haut Report.

Because the OIC filed a copy of the January 30, 1995 certified copy of the Haut Report with the district court (ER 241-45) and because it appears that this copy may be even more fraudulent than the other two certified copies, the OIC should be especially concerned about possibly having filed a fraudulently altered document with the district court. Even if the OIC is unconcerned about such a possibility, this Court may be concerned. This Court may wish to order the OIC to obtain the original version of the Haut Report from the Virginia Office of Chief Medical Examiner to determine what the truth is.

k. Fiske and Starr Concealed Important Evidence About The X-Rays

Additional documents released by the OIC prove that both the Fiske and Starr reports concealed evidence establishing that their conclusions about the lack of x-rays are not trustworthy. Moreover, the documents raise serious questions about whether the autopsy doctor and his assistant have been lying about the lack of readable x-rays. Although the documents do not conclusively resolve the matter or conclusively prove that anybody lied, the documents prove that the Fiske and Starr reports withheld critical information

from the public and the three-judge panel overseeing the OIC.

If readable x-rays of Foster's body had been taken after his death and preserved, as would be routinely done under these circumstances, many of the questions about his wounds might be answered. For example, if Foster had been shot with a .22 in the neck, that bullet may have remained in the head to be seen on x-rays. However, officially, no readable x-rays were made although Starr's report stated that, "the gunshot wound chart in the autopsy report has a mark next to 'x-rays made.'" ER 356.

Starr's report stated that the autopsy doctor, Dr. Beyer, "stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized." ER 357.

Dr. Beyer's claim that there were no readable x-rays is contradicted by the report of a Park Police officer who attended a portion of the autopsy, and who was quoted by Starr: "Officer Morrissette's report, prepared after the autopsy, stated that 'Dr. Byer [sic] stated that X-rays indicated that there was no evidence of bullet fragments in the head.' USPP Report (Morrissette) at 1." ER 357. Starr's report then stated: "[H]owever, Dr. Beyer made that statement and reached that conclusion without x-rays." ER 357.

Starr implied that the reason for the lack of readable x-rays is that the x-ray machine was not functioning properly. Starr's report quoted Dr. Beyer as stating that "our x-ray machine was not functioning properly that day . . . ." ER 356. Starr's report stated that Dr. Beyer's assistant "recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly." ER 356. Starr's report stated, "the administrative manager of the Medical Examiner's Office recalled 'numerous problems' with the x-ray machine in 1993 (which,

according to records, had been delivered in June 1993)." ER 357.

In response to a FOIA lawsuit by Accuracy in Media, the OIC released partially redacted copies of invoices for service work on the x-ray machine.[15] The invoices show service calls on October 29, 1993 and November 8 and 12 of 1993. No invoices were produced showing any service work prior to Foster's date of death, July 20, 1993, despite the fact that AIM's FOIA request asked for all 1993 service records.[16] According to these invoices, the first service call was made more than *three months after* Foster's death.[17]

These invoices were not disclosed in the Fiske or Starr reports. These invoices undermine the claims that the x-ray machine was malfunctioning around July 20, 1993. If the x-ray machine was malfunctioning around the time of Foster's death, then where are the invoices for service work at that time? If Dr. Beyer knew before Foster died that the x-ray machine was not working properly, why did he put a mark next to "x-rays made" on the gunshot wound chart in the autopsy report and why didn't he obtain a properly working x-ray machine for this exceptionally important case? Why would the Medical Examiner's office wait more than three months after it supposedly knew its x-ray machine was malfunctioning to have service performed on the machine? Why didn't the Fiske or Starr reports discuss whether other

[15] These records were filed in August 2001 in the case entitled *Accuracy in Media, Inc. v. Office of Independent Counsel*, no. 99CV3448 (ESH) (D.D.C.). The invoices, an excerpt from the *Vaughn* index in that case and an authenticating declaration from AIM's attorney, were an addendum to a brief in the Ninth Circuit. *See* Appellant's Opening Brief in Appeal II (Ninth Circuit case no. 01-55487) (filed May 30, 2001).

[16] The request was for: "Any and all service records for the x-ray machine at the Medical Examiners Office, Northern Virginia Division located in Medical Examiners suite (1993)." Appellant's Opening Brief at Addendum (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Clarke exhibit 2, page 3.

[17] Appellant's Opening Brief at Addendum (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Clarke exhibit 1, pages 1-3.

autopsies by the Virginia Office Of Medical Examiner during 1993 had any x-ray problems?

A legitimate question exists about whether the x-ray machine was functioning properly when Foster died and whether a cover story has been concocted to hide the fact that x-rays were taken, but later destroyed because they showed something inconsistent with the Government's official story of the death.

3. The Photos Will Help The Public Determine How The Government Investigated And Reported This Death

The photos will either be consistent with the Government's reports and other publicly available evidence from the Government, or they will be inconsistent with those reports and evidence. Because the Fiske and Starr reports have no credibility, the public must see the photos to make this determination. The OIC fails to explain why photos of a body that has been mysteriously shot reveal nothing about the quality of the investigation into that death or the quality of the Government reports to the public about that death.

a. The Leaked Gun-In-Hand Photo

The district court ordered that the photo entitled "1 – Right hand showing gun & thumb in guard" should be released.[18] ER 410. The Ninth Circuit affirmed this ruling. Pet. App. 2a. The original of this photo is important because there is controversy about why the gun would have remained in Foster's hand had he shot himself. Both Fiske and Starr said that the gun remained in his hand because Foster's thumb was trapped and compressed between the trigger and the trigger guard of the gun. ER 610-11, 616, 620. The publicly available "leaked" published copy of the photo is too degraded to make a definitive evaluation of whether Foster's thumb was extended through the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of this photo would provide a much better view of his thumb and the trigger area.

[18] Published color copies of the photo are at ER 178 & 179.

Also, common sense tells us that the explosion of supersonic gasses from a .38 high velocity gunshot into the mouth is likely to cause a "blowback" of blood and other organic matter out of the mouth and onto Foster's gun, hand and sleeve. Indeed, Starr quotes Dr. Henry Lee as saying that he examined the photos taken at the park and found "blood spatters" on Foster's hands and shirt. ER 616, 621. Starr quotes Lee as saying that this "backspatter" is typical. ER 616, 621. The original photo will allow the public to see if there is any such backspatter.

There also is a question about why the gun appears to be partially lodged under Foster's leg. If he shot himself with that gun while sitting on the ground, how did it get under his leg? The original photo will provide a more detailed view and allow a better evaluation of whether the gun is lodged under his leg.

Although the degraded published version of the photo was not officially released, the fact remains that any privacy interest in the original is virtually nil because ABC, Time and Newsweek have given the published version far greater exposure than Favish could ever give any version he might receive.

b. The Photo Entitled "5 – VF's body – focusing on the Rt. side shoulder/arm"

The district court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side shoulder/arm" should be released. ER 409. The Ninth Circuit affirmed this ruling. Pet. App. 2a.

In its motion to alter the judgment in the district court, the OIC stated that this photo shows "blood stains and/or blood . . . ." ER 482. This photo may help solve the mystery about blood flow patterns and an alleged neck wound that officially did not exist.

As Starr stated, paramedic Richard Arthur, "initially said he saw what 'appeared to be a bullet wound, an entrance wound' on the neck." ER 277, 314-15. Unstated by Starr is that Arthur testified he was 2-3 feet away from Foster when

he observed the alleged bullet neck wound on the right side of Foster's neck, around the jaw line and underneath the right ear. ER 119-20, 122-23. But, citing a *nonpublic* FBI report, Starr said that Arthur told the FBI in 1996 that *autopsy photos* (not the photos taken at the park) Arthur examined were taken from a better angle and a better view than what he had at the park and he may have been mistaken about such a wound. ER 277, 314-15. The public has no way to verify whether Arthur was shown pristine original autopsy photos of Foster. The OIC now states that Arthur "recanted" in 1996. Pet. Br. 37 n.22. Arthur did not recant. According to Starr, Arthur said he *may* have been mistaken. The reader can judge for himself whether Arthur "recanted" or after three years of the Government questioning him, he finally just gave them enough to make them stop while maintaining his own dignity.

The alleged neck wound also is discussed in two books by major United States publishers.[19] These books allege a story of illegal conduct by certain members of the OIC and the FBI in trying to prevent proper enlargement and examination of the pristine original of at least one of the six Polaroid photos not ordered released. *Id.* Allegedly, this was done to conceal a neck wound that officially did not exist. *Id.* The books allege an effort to illegally obstruct the work of Assistant United States Attorney Miquel Rodriguez and his former assistant Lucia Rambusch while they were working on the Foster death investigation at the OIC.[20] *Id.* One of the authors of the two books, Ambrose Evans-Pritchard, stated in a declaration, "I have seen the photograph showing an

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[19] ER 423-30 (Christopher Ruddy, The Strange Death of Vincent Foster: An Investigation 163-65 (The Free Press, a division of Simon & Schuster, Inc., 1997)); ER 423, 431-53 (Ambrose Evans-Pritchard, The Secret Life of Bill Clinton: The Unreported Stories 135-53 (Regnery Publishing, Inc., 1997)).

[20] The OIC cites http://www.fbicover-up.com (Pet. Br. 30 n.17) that contains links to unathenticated audio recordings purporting to be of Rodriguez.

apparent neck wound to Foster's neck . . . ." ER 601, 656, 662.

It is undisputed that one of Starr's experts reported seeing dried blood on Foster's neck in an *autopsy* photo, supposedly taken after the body was washed, and the location of that dried blood coincided with the location of the alleged neck wound reportedly seen by a paramedic at the park and allegedly visible in an enhanced copy of the original photo. ER 277, 345. There is nothing in the Starr Report indicating that this expert viewed the original Polaroid photo at issue here that is alleged to show a neck wound when enhanced or explaining why this expert was not shown this photo.

Moreover, Starr discussed blood draining from Foster's "right nostril" and "right side of the mouth." ER 277, 345. Starr stated that many witnesses who saw Foster at the scene described his head as "facing virtually straight, not tilting noticeably to one side or the other." ER 347. Starr also discussed "a blood transfer stain in the area of the right side of the face" that Dr. Lee allegedly concluded was made when Foster's "head made contact with the right shoulder at some point before the Polaroids were taken" (ER 277, 347) thereby causing a blood stain to transfer from Foster's shoulder to his cheek.

Starr was unable to explain how this happened and could only speculate about who might have moved Foster's head because none of the Park Police or paramedics who were among the first to see Foster's body at the scene stated that they moved Foster's head. ER 277, 347. Neither Fiske or Starr was able to definitively state how Foster's head made contact with his right shoulder and then returned to a straight-up position to leave the transfer stain on his cheek. Starr implied that the blood on Foster's right shoulder came from the blood draining from the nostril and mouth. ER 277, 344-347. Thus Starr implied that the blood draining from the nostril and mouth came first and then stained the shoulder, and then the transfer stain was made on the cheek *over* the blood trail from the nostril and mouth.

However, more recently released evidence from Dr. Lee's report for Starr demonstrates that Starr's implied scenario did not happen. The new evidence raises questions about whether the head was moved more than once and whether the blood on the shoulder initially came from a neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck by tilting the head to spill blood from the mouth over the right side of the neck.

According to Lee's report: "A portion of the blood trail from Mr. Foster's mouth appears to have been deposited on top of the transfer pattern after his face was separated from the shoulder region." ER 601, 654-655. *Starr failed to tell this to the public*. Starr led the public to believe that blood drained from Foster's nostril and mouth and stained his shoulder. Then, Starr implies, some unknown person tilted Foster's head so that the right cheek touched the blood on the shoulder and then that person moved Foster's head off the shoulder back to the straight-up position, leaving the transfer stain on the cheek.

Starr did not tell the public that Lee stated that *after* this transfer stain was made, more blood drained from Foster's mouth. How could more blood have drained from Foster's mouth at that point, unless somebody tilted his head again? Presumably his heart had long since stopped beating and at least some of the blood had already drained from his mouth to stain the shoulder.

Starr does not tell us what caused the flow of blood out of Foster's mouth that is described by Lee as going on top of the transfer stain on Foster's cheek. Given Starr's failure to explain this second blood flow, to fit the facts reported by Lee, it appears that one has to assume that the head was moved for a second time. This second movement means that after whomever moved Foster's head the first time, someone (who presumably had no business moving the head of a man known to be dead at a possible crime scene) moved the head with the result that blood streamed down the right side of the head and onto the neck and shoulder. *Therefore, we now have*

evidence for a possible second movement of Foster's head that Starr failed to report.

This leaves the American public in a position of having to make educated guesses with insufficient evidence about what happened. The public should not have to do that. One educated guess is that the shoulder became stained with blood that was draining from a right-side neck wound (that officially did not exist). Then some unknown person moved Foster's head, causing the right cheek to touch the bloodstained right shoulder, thereby creating the transfer stain on the right cheek, and then moved his head back to the straight-up position. Subsequently, somebody moved Foster's head for a second time to the right in order to spill some blood that was collected in the mouth out the right side of the mouth to cover the blood trail that was coming from the neck and make it appear that all the blood was originating from the mouth and nostril, and none from the neck.

Such an educated guess is consistent with something else Lee stated *that Starr did not tell the public*: "A pool of blood appears to be directly under the right side of his neck and shoulder region." ER 601, 654, 655. Unfortunately, the public is left to this sort of educated guessing because the government has not dealt with the public honestly. We know that Lee told Starr that the contact stain was created before the blood trail from the mouth, implying that they were caused by two separate events. *We know that Starr failed to tell this to the public*. We also know that neither Lee nor Starr offered any explanation of how this happened.

The public must see these photos so that the public can provide the careful analysis that the government failed to provide. Perhaps the photos will show whether the amount of blood that pooled under the right side of the neck and shoulder region, as reported by Lee *and concealed by Starr*, is too great to have come from the mouth and nostril, thus indicating it came from the neck.

We are dealing with a mystery. By nature, we don't know all the answers. We do not know all the right questions

to ask. Public release is the only way to ensure that these photos are given the scrutiny they deserve.

c. The photo entitled "8 – VF's face - Taken from right side focusing on face & blood on shoulder"

The district court ordered that the photo entitled "8 – VF's face - Taken from right side focusing on face & blood on shoulder" should not be released. ER 410. The Ninth Circuit affirmed this ruling. Pet. App. 2a. This may be the controversial alleged neck wound photo allegedly taken by Park Police Officer John Rolla. ER 431, 440, 557. Very possibly, the Foster death controversy can be ended with release of the neck portion of this photo so that it may be blown-up or enhanced. For the reasons discussed above, this photo should be released.

d. The Other Photos

All of the other photos should be released because they may help solve the undisputed mystery about the blood flow patterns discussed above.

4. *AIM v. National Park Service* Was Wrongly Decided

In *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), the D.C. Circuit denied a FOIA request for access to *copies* of the photos at issue in the present case.[21] (It is common knowledge that copies of Polaroids have less detail than the original photos.) In so doing, the D.C. Circuit never relied on a right of Foster's survivors to have their memory of him protected from violation. In a hopelessly confused opinion, the D.C. Circuit stated that its decision *did not* decide whether Foster's survivors or even Foster himself had a privacy interest in the photos! *AIM*, 194 F.3d at 123. By denying that it decided an issue that was central to the case, the D.C. Circuit destroyed the credibility of its opinion.

Moreover, in *AIM* the D.C. Circuit used an incorrect standard:

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[21] The OIC is in possession of the original photos at issue here. ER 237.

> To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence."

AIM, 194 F.3d at 124.

This is an improper standard. Exemption 7(C) states that disclosure may be denied when it would lead to an "unwarranted" invasion of personal privacy. The Exemption does not say anything about having to produce "compelling evidence" in order to make the invasion "warranted" or that it must be evidence of "illegal activity" in order to make the invasion "warranted". This Court has held that the FOIA's exemptions must be narrowly construed to promote the FOIA's purpose of government disclosure. *See Dep't of the Air Force*, 425 U.S. at 360-61 (1976).

By imposing the additional burdens of "compelling evidence" and "illegal activity" for those trying to show that the public interest in disclosure of a particular record is paramount to the privacy interest of a single person or a few persons, the D.C. Circuit gave the privacy exemption a broad construction that has no basis in the statutory language or Congressional intent. The D.C. Circuit never explained how its standard is consistent with the FOIA as interpreted by this Court. For example, why require evidence of illegal activity when the public also has an interest in discovering negligent government activity?

5. If Any Portions Of The Photos Are To Be Withheld, The Court Must Consider Redaction Of The Photos

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Therefore, if it is determined that Foster's survivors have a privacy interest in a photo, and that after that interest is balanced against the public's interest in disclosure it is determined that the photo cannot be released

in its entirety, the Government only is authorized to withhold those portions of the photo that would violate the survivors' privacy interest.

Favish made requests to the district court and the Ninth Circuit that if any portions of the photos are to be withheld, then those portions should be redacted and the remaining portions released.[22] Neither court addressed those requests.

It is common practice for the government to disclose text documents pursuant to the FOIA with exempt information redacted. This allows the nonexempt portion of the document to be disclosed, in conformity with 5 U.S.C. § 552(b). There is no reason why image documents, like Polaroid photos, should not also be subject to redaction when they include information that is exempt from disclosure and information that is nonexempt. Under the FOIA, the Government is required to release all nonexempt information.

If it is determined that Foster's survivors have a privacy interest in any of the photos, no matter what definition of "privacy" is used to reach that determination, it is inconceivable that everything in the withheld photos, if disclosed, would fall under that definition of privacy. For example, if it were ultimately held that a particular view of Foster's face, or portion thereof, was an element that would make a photo unsuitable for release, then that photo can be redacted to omit the offending element without altering the original photo, so as to allow release of the rest of the photo.

Such redaction would be especially appropriate with at least one of the five photos the district court refused to order released. That photo, *after being enlarged*, may depict the alleged neck wound described in the books. This photo is described as "8 - VF's face - Taken from right side focusing on face & blood on shoulder. . . ." ER 410. The book

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[22] ER 41, Appellant's Opening Brief at 57-59 (Ninth Circuit no. 01-55487) (filed May 30, 2001) (Appeal II), Reply/Answering Brief of Favish at 10-11 (Ninth Circuit no. 01-55487) (filed Oct. 9, 2001) (Appeal II).

excerpts discuss a Polaroid photo that, *when enlarged*, reveals a neck wound that officially did not exist, despite a report of such a wound by at least one paramedic at the scene (ER 277, 315) and a report by Starr's expert, Dr. Blackbourne, of dried blood at the same location on Foster's neck when the surrounding blood had been washed away during the autopsy. ER 277, 345. One of the book authors stated in a declaration that he saw the photo and a neck wound is apparent. ER 601, 656, 662.

Additionally, Starr's expert, Dr. Lee made a statement in his report that Starr failed to discuss in his report. Lee stated: "A pool of blood appears to be directly under the right side of his neck and shoulder region." ER 601, 654, 655. This particular photo appears to be the photo discussed in the books because one of the book excerpts states that the photo was taken by Park Police Officer John Rolla (ER 431, 440) and this photo is identified as having been taken by Rolla. ER 557.

The district court withheld this photo because it is "so explicit as to be not discoverable as it clearly violates the privacy of the survivors." ER 410. It is unclear from the district court's ruling whether partial redaction of the photo, perhaps of the face area or portion thereof, while leaving the neck area visible, would make it appropriate for release, given the public's interest in seeing whether the alleged neck wound exists. There is nothing to indicate that release of such a redacted photo, showing only the neck area of the body, which officially did not have a wound, would violate whatever privacy interest may be found to exist to such an extent that the public should be denied the opportunity to see for itself if this alleged neck wound exists. The OIC contends that there is no such neck wound. How can a photo, with the face redacted, showing only what the OIC contends is an unwounded neck with a trail of blood, be a significant assault on whatever privacy interest may be found to exist?

By failing to consider partial redaction of the withheld photos the district court and the Ninth Circuit wrongfully

denied disclosure of the nonexempt information in those photos, in violation of the FOIA.

6. The Deposition Of Miquel Rodriguez Should Be Taken

In order to ensure that the courts are shown the original pristine versions of the subject photos *in camera*, deposition testimony should be taken from Assistant United States Attorney Miquel Rodriguez. *See* ER 411-73, 664-71.

CONCLUSION

All of the photos should be released to the public. Foster's family members do not have any privacy interest in the photos. However, any privacy interest they may have in the photos is diminished by the fact that he was a high-ranking Government employee. Obviously the public has an interest in examining how its employees investigate deaths. But that interest is greater when the deceased is a person of Foster's position. When a high-ranking government employee dies a violent death, the public has a right to know if that death occurred in the manner claimed by the Government.

Apart from the tragedy of Foster's death, Foster's family has been denied the closure that any family would desire. However, the blame for this lack of closure does not lie with those who are seeking the truth in order to keep their government honest. It lies with government officials who have produced reports about the death that have no credibility. This case is what the FOIA is all about.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

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REPLY BRIEF OF RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

In applying FOIA Exemption 7(C) to determine whether disclosure of the photographs at issue "could reasonably be expected to constitute an unwarranted invasion of personal privacy", this Court must engage in a balancing process. Whatever public interest there is in knowing what the government is up to must be balanced against the privacy interests involved. The requester has the burden of "identify[ing] with reasonable specificity the public interest that would be served by release."[1] Only disclosure that would "contribute significantly to public understanding of the operations or activities of government" is in the public interest.[2]

The Foster family has powerful privacy interests in defeating Respondent Favish's macabre, disquieting request for the ten photographs of Vince Foster's body taken shortly after his suicide. The family seeks to avoid seeing images of Mr. Foster's body on television or in supermarket tabloids. It wants to be free of the oppressive knowledge that the photographs are on the Internet and available worldwide to millions of people in virtual perpetuity. It desires to forestall the noxious intrusions by the media and others that inevitably will follow disclosure of the photographs.

There is, on the other hand, no legitimate public interest in disclosure. Public curiosity about a tragic death does not equate to the public interest. Where uncovering of

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1 *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993).

2 *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989) (emphasis added).

wrongdoing is, as here, the public interest asserted, the requester must present more than just allegations of misconduct. Rather, he or she must set forth compelling, or at least persuasive, evidence of such wrongdoing. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 124 (D.C. Cir. 1999). This Favish has not done. Nothing he has said to challenge the conclusion that Mr. Foster committed suicide in Fort Marcy Park in Northern Virginia demonstrates official misconduct. The need for more persuasive evidence is particularly evident where five separate investigations -- two by Independent Counsel -- have reached this conclusion, and a wealth of supporting documents already has been released. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1179-80 (9th Cir. 2000), *cert. granted*, 123 S.Ct. 1928 (2003), Pet. App. 26a-29a (Pregerson, J., dissenting).[3] Nor can Favish show any nexus between the four photographs the Court of Appeals ordered released and the public interest, because those photographs reveal nothing relevant to his misguided hypothesis that the wound Mr. Foster suffered is inconsistent with suicide. JA 45a-46a.[4] Moreover, the court

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[3] *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (public interest in identity of Haitian refugees interviewed by State Department was "adequately served" by release of redacted interview summaries); *Halloran v. U.S. Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) (public interest in VA investigation "has already been substantially served" by release of redacted transcripts and the VA report); *Marzen v. U.S. Dep't of Health & Human Serv.*, 825 F.2d 1148, 1153-54 (7th Cir. 1987) (public release of intimate details of disabled infant's death "would not appreciably serve the ethical debate" because most of the factual material, "including the final HHS report," was already public); *Miller v. Bell*, 661 F.2d 623, 630-31 (7th Cir. 1981) (documents already released "should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation"); *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (public interests "have been served to a large extent by the substantial release of information already made in this case").

[4] *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (public interest must be shown "with respect to the

of appeals' ruling, the district court opinion and the Vaughn index indicate that the other six photographs are so gruesome that a grave, unconscionable invasion of family privacy would result even under the Ninth Circuit's flawed analysis. Pet. App. 3a, 44a-46a.

In *Reporters Committee*, this Court cautioned against a "cramped notion of [the] personal privacy" that Exemption 7(C) protects. 489 U.S. at 763. Recognizing Congress' intent to provide meaningful privacy protection to investigative records, *Reporters Committee* and other decisions have protected a broad range of government records where public release might cause annoyance or embarrassment. *U.S. Dep't of Defense v. F.L.R.A.*, 510 U.S. 487 (1994) (names and addresses of federal employees); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("place of birth, date of birth, date of marriage, employment history, and comparable data"). The public release Favish seeks would do much more than cause the Foster family mere annoyance or embarrassment. To that family -- or to any surviving family -- the public circulation, in the media or on the Internet, of photographs of their loved one's dead body would be a deep and personal indignity. It is inconceivable that Congress intended to allow such a wrenching invasion of personal privacy.

Favish's unsupported assertions of wrongdoing or gross errors in the numerous investigations of Mr. Foster's death are insufficient to override the Foster family's significant privacy interest. Indeed, given recent history, the suggestion that Independent Counsel Starr somehow

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specific information being withheld"); *Kimberlin v. U.S. Dep't of Treasury*, 774 F.2d 204, 208 (7th Cir. 1985) (FOIA requester must show that "benefit would accrue to the public from the disclosure of this document"); *Bast v. U.S. Dep't of Justice*, 665 F.2d at 1255 ("incremental advantage to the public" must be weighed against invasion of personal privacy).

conspired with Clinton Administration officials to conceal wrongdoing by persons in that Administration is too fatuous and bizarre to warrant a response. If allegations of this kind were sufficient to override a privacy interest in law enforcement documents, then no meaning would be left in the privacy protection afforded by Exemption 7(C).

I. The Foster Family Has A Personal Privacy Interest In Non-Disclosure Of The Photographs

1. Favish and some amici argue that, under both FOIA and the common law, the right of privacy is personal and does not survive death. Accordingly, they argue, invasion of a deceased person's privacy cannot be asserted by that person's surviving family. Favish Brief at 3-18; Silha Center Brief at 5-9, Ass'n of Am. Physicians & Surgeons Brief at 6-8.

That argument erroneously assumes that the Foster family is seeking to assert Mr. Foster's right of privacy. To the contrary, the Foster family asserts its own right as a family against public display of photographs of the dead body of a loved one. The right exists to protect the surviving family against the deeply personal hurt and indignity that would be occasioned, *inter alia*, by the public display of their loved one's corpse in the media or on the Internet. There can be no denying the personal nature of the "shock" Mr. Foster's widow experienced on seeing on television the leaked picture of his dead hand holding the gun, or the personal nature of "nightmares and heart-pounding insomnia" that disclosure caused his sister. JA 91, 93. The mortification and horror the family itself would suffer if additional photographs are "placed on the Internet for world consumption" would be deeply personal. JA 95. Where autopsy photographs had been published on Internet sites devoted to images of violent death, one court found that "the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal

distress and trauma" to the families involved. *Earnhardt v. Volusia County*, No. 2001-30373-CICI, 2001 WL 992068, *3 (Fla. Cir. Ct. July 10, 2001). The public dissemination of such photographs invades the "personal privacy" of the surviving family under any reasonable definition.

All the courts that have considered the matter under the FOIA, including the court below, recognize that the statute protects the privacy rights of surviving family members. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000), Pet. App. 13a ("the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love"); *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d at 123 ('[w]hile law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parent, and children of the deceased is one of privacy."); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 185-6 (D.C. Cir. 1987) (autopsy reports that "shock the sensibilities of surviving kin" are subject to privacy exemption); *Hale v. U.S. Dep't of Justice*, 973 F.2d at 902 ("personal privacy interests of the victim's family" would be invaded by public release of photographs of murder victim's body); *New York Times Co. v. NASA*, 782 F.Supp. 628, 632 (D.D.C. 1991)(surviving families of Challenger astronauts have a "substantial" privacy interest against public disclosure of tapes of their last moments); *Katz v. Nat'l Archives & Records Admin.*, 862 F.Supp. 476, 483 (D.D.C. 1994)(surviving family has privacy interest in autopsy photographs of President Kennedy), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995).

2. There is, moreover, significant support in the common law for recognition of a family's privacy right in images of the body of a deceased family member. Recently, the Supreme Court of Washington, sitting *en banc*, sustained

a common-law action for breach of privacy against employees of the county coroner's office who showed autopsy and death scene photographs of their loved ones to persons having no legitimate reason to see them, in one case displaying the photographs at cocktail parties. *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998). *Reid* relied on a Kentucky Supreme Court case that allowed an action against a photographer who displayed photographs of plaintiffs' deceased twin children who had been born joined together. *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912). That case declared:

> If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to public view in an effort to make money out of it, it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that in supposed degree, but not in kind.

149 S.W. at 850.

The *Restatement* recognizes that privacy extends to matters not normally revealed beyond the family or close personal friends, utilizing a version of the Kentucky case as an illustration. *Restatement (Second) of Torts* § 652D cmt. *b* at 386, 387 (illustration 7).[5] The surviving family's privacy

[5] The *Restatement*, in stating that a common law cause of action for breach of privacy "cannot be maintained by other persons such as members of the individual's family, *unless their own privacy is invaded along with his*," *Restatement (Second) of Torts* § 652I cmt. *a* (1977) (emphasis added), recognizes that family members may have their own action for breach of privacy.

right also is supported by cases establishing that survivors have a personal right to control the disposition of the body of a deceased family member. *See* Brief for Respondents Anthony and Moody at 26 n.15. As the Kentucky court observed, "the most tender affections of the human heart cluster about the body of one's dead child," and if the family "may recover for any injury or indignity done the body . . . it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." *Douglas v. Stokes*, 149 S.W. at 850.

The offense the Foster family would suffer if photographs of his body appeared on the Internet is similar to that plaintiffs in *Reid v. Pierce County* suffered when photographs of their loved one's body were passed around at cocktail parties by a coroner's office employee. Indeed, instant communications on the Internet plausibly may be viewed as the high-tech equivalent of cocktail party conversations. In both cases, the injury from display of these photographs would be real and personal to the plaintiffs. Exemption 7(C) protects against such a shocking invasion of personal privacy.[6]

3. One amicus brief cites a common-law

[6] One amicus brief argues that Foster's children have not joined in the suit, suggesting that they do not join in the efforts of their mother and aunt to prevent an invasion of family privacy or agree with the findings of suicide. Ass'n of Am. Physicians & Surgeons Brief at 8, 14-15. But the declaration of Foster's widow states that her opposition to release is in accordance with" the wishes of the members of our family." JA 92. *See also* JA 93 (Amended Declaration of Sheila Foster Anthony). The suggestion this amicus brief puts forward is both totally wrong and a grasping at straws in the face of the powerful Amended Declarations of Ms. Anthony and Ms. Moody, which vividly demonstrate the devastating invasions of family privacy that will result if the photographs are released.

decision holding that a father could not bring a common-law privacy action for publication of the details of his daughter's murder. Silha Center Brief at 8-9 (citing *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 991 (6th Cir. 1969)). However, as this Court stated in *Reporters Committee*, "the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy." 489 U.S. at 762 n.13.[7] Indeed, *Reporters Committee* defined "private" information as information "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." 489 U.S. at 763-64 (quoting Webster's *Third New International Dictionary* 1804 (1976)). Images of the dead body of a family member are normally not intended for anyone outside the family, except in limited circumstances for law enforcement; certainly such images are not expected to be "freely available to the public." There is no common-law tradition in this country of public access to autopsy or death-scene photographs. Petitioner's Brief at 26-27.

There are at least two reasons of no relevance in the FOIA context why a court might be reluctant to recognize a common-law right of privacy against publication of gruesome details of a family member's death. The consequence of recognizing a common-law right is to allow a survivor to sue for damages. In that context, some courts believe that "the danger of spurious claims is too great." *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 991 (6th Cir. 1969). *See also Smith v. City of Artesia*, 772 P.2d 373, 375 (N.M. 1989), citing "possible misuse" of a damages action and the "traditional reluctance to permit damages that are solely emotional."

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[7] In *Marzen v. U.S. Dep't of Health & Human Serv.*, 825 F.2d 1148, 152 (7th Cir. 1987), the court stated that "the privacy interest protected under the FOIA extends beyond the common law."

In the FOIA context, however, persons asserting a privacy right are not improperly attempting to gain a damages recovery. Unlike plaintiffs in a damages action, the Foster family seeks no profit from its distress; it simply is striving to prevent a further intrusive prolongation of the nightmarish ordeal it has suffered for more than a decade.

In addition, some common-law cases involved publication of the details of a loved one's death that already were a matter of public record. In one case, the defendant had identified plaintiff's daughter as the victim of a rape and murder, on the basis of publicly-available records of a judicial proceeding. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In another case, defendant had published a grisly account of the murder of plaintiff's daughter, where the facts already were a part of the public record. *Cordell v. Detective Publications, Inc.*, 307 F.Supp. 1212, 1218 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969). Allowing a damages action for violation of privacy against an entity that publishes facts already on the public record, this Court has found, would be a violation of the First Amendment. *Cox Broadcasting Corp. v. Cohn*, *supra*.[8]

By contrast, the issue in the present case is not whether the media may publish material already on the public record. The issue is whether death scene photographs should be released to the public. Favish has no First Amendment right to obtain these photographs; any rights he may have are derived exclusively from the FOIA. Application of FOIA Exemption 7(C) to protect the Foster family's privacy raises no constitutional issue. *Houchins v. KQED*, 438 U.S. 1 (1978).

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[8] In *Cox*, the Georgia Supreme Court had found that the father's privacy interest had been invaded, but this Court held that the First Amendment prevented a tort action.

4. Some amici argue that the Foster family's privacy interest is "diminished" because Foster was a significant public official who committed suicide while embroiled in a high-profile political controversy. Reporters Committee Brief at 29, Silha Center Brief at 21 n.11. However, while government officials themselves "may have a somewhat diminished privacy interest," they "do not surrender all rights to personal privacy when they accept a public appointment." *Quinon v. F.B.I.*, 86 F.3d 1222, 1230 (D.C. Cir. 1996) (records involving Chief Judge Tjoflat)(quoting *Bast v. U.S. Dep't of Justice,* 665 F.2d 1251, 1256 (D.C. Cir. 1981). More significantly, the family of a high government official is not required to endure the same privacy intrusions that may be inflicted on the official. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976) (wife of Firestone heir not a "public figure"). After the death of the Governor of Washington, Dixie Lee Ray, her family's right of privacy protected them from the indignity of having her autopsy photographs passed around at cocktail parties. *Reid v. Pierce County*, 961 P.2d at 335.[9] Despite Foster's status as a public official, the Foster family had the right to choose, as it did, a closed-casket funeral. J.A. 91. The indiscriminate circulation on the Internet of photographs of his body would make a mockery of that choice.

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[9] The claims by the Association of American Physicians & Surgeons (Brief at 5) that Mr. Foster had no expectation of privacy because he took his life in a public park ignores the fact that he suffered from a tormenting disease -- depression -- that robbed him of rationality. JA 195-220; *Fiske Report* 21-22, 51. In addition, the issue here involves not his right of privacy, but that possessed by members of his family, which as shown above is separate and apart from the privacy rights he enjoyed. Moreover, the site where Foster shot himself was surrounded by dense foliage and trees, 200 yards from the park's parking area (JA 119-20, 177-78, 195) -- not the kind of area where one might expect a crowd of onlookers and newspaper photographers to arrive before police could cordon off the scene.

One amicus brief attempts to justify the intrusion sought here by arguing that Foster family members already have been subjected to a great deal of probing and publicity about his death. Reporters Committee Brief at 28. But there must be some limit to the intrusions allowed, and that limit surely is exceeded by public display of photographs of their loved one's corpse.[10]

The claims by this same amicus brief that, given the history of this matter, the invasion of privacy caused by release of the photographs would be "minimal" or "muted" (Reporters Committee Brief at 6, 30) are appalling to the family. That brief studiously and callously avoids dealing with the heart-felt declarations of Mr. Foster's wife and sister that establish that the potential privacy invasions would be catastrophic. JA 90, 93. One wonders if those approving this amicus brief would make similar assertions if photographs of their dead, bloodstained loved ones were at issue.[11]

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[10] Favish argues that the photographs could be redacted to eliminate identifying details. Favish Brief at 47-50. But the claimed purpose for release is achieved only if the body is identified. And, of course, everyone would know, including the family, that the body is Mr. Foster's. The family's privacy would still be invaded.

[11] As already discussed, Brief for Respondents Anthony and Moody, 29 n.20, the fact that the photograph of Mr. Foster's hand previously was leaked to the press does not mean that a further release of the more graphic color version of that photograph would not invade the family's privacy. This Court has recognized "the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Reporters Committee*, 489 U.S. at 767. In *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976), the Court required redaction of summaries of cadet discipline despite earlier disclosure, because those with earlier access "may have wholly forgotten" the identities of the cadets involved. *See also Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("[R]enewed publicity brings with it renewed invasion of privacy.").

5. Another amicus brief, while conceding that the two cases involving the photographs at issue "address only the interests of family members in avoiding graphic or emotionally disturbing images of a deceased loved one," expresses concern that a survivor's privacy right "easily could evolve into a generalized 'family privacy' interest," precluding any damaging revelations about the deceased. Silha Center Brief at 20 (citing *Accuracy in Media v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999); *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000)). However, as observed in our opening brief, the moments immediately surrounding death are viewed as unique and private by both law and tradition. The case law recognizes that the surviving family has a legal right to dispose of the body of a deceased family member, and long-standing cultural tradition regards the public display of a corpse without family consent as deeply offensive. Brief for Respondents Anthony and Moody at 25-27 and nn.15, 17. There is no comparable legal protection or cultural stricture against criticism of, or damaging revelations about, the deceased, even though such conduct also may cause the surviving family distress. However a family's right of privacy may be limited, it clearly attaches where anguishing moments surrounding death are displayed or recorded.

For this reason, cases extend the family's privacy right to sounds and images of loved ones nearing death. *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C. 1991) (rejecting FOIA request for tape of last moments of the Challenger space shuttle crew); *New York Times Co. v. City of New York Fire Dep't*, 754 N.Y.S.2d 517, 523 (N.Y. Sup. Ct. 2003) (rejecting request under State public information law for transcript and tapes of "calls for help in extremis" from World Trade Center victims). Such a limited application of family's privacy rights presents no danger of the blanket extension of such rights that amicus hypothesizes.

Indeed, the alternative to recognition of such a privacy right is unthinkable. There are Internet sites devoted to the public display of gruesome images of dead bodies, including autopsy photographs. Petitioner's Brief at 30 n.17; Earnhardt Brief at 5-6. To visit those sites is to be repulsed. If there is no privacy right of survivors against such offensive displays, autopsy photographs in the hands of the federal government soon routinely will become the grist of the grisly displays on such sites. It is inconceivable that Congress, in enacting Exemption 7(C)'s protections of "personal" privacy, intended to deny privacy protection to surviving families seeking to avoid the gross indignity and anguish such displays would cause.

II. The FOIA Balancing Required By Exemption 7(C) Is Not Tilted Toward Disclosure

Favish and the some amici argue that, because disclosure is the overriding purpose of FOIA, the privacy exemptions should be construed narrowly to exclude any privacy right of a surviving family. Favish Brief at 4, 8, 47; Silha Center Brief at 1; Reporters Committee Brief at 7-8, 9-10. However, while other FOIA exemptions may be construed narrowly to favor the Act's overall policy of disclosure, Exemption 7(C) is "notable" in requiring a balance that "is not similarly 'tilted emphatically in favor of disclosure.'" *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (R. Ginsburg, J.) (quoting *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). Indeed, Congress has shown a concern in ensuring the effectiveness of Exemption 7(C)'s protection of privacy by amending it to broaden the scope of its protection. *Reporters Committee*, 489 U.S. 749, 756 (1989). Moreover, the legislative history of the Exemption 6 privacy provision shows that Congress regarded protection of privacy as "equally important" as the broad policy of public disclosure. S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965), *quoted in U.S.*

Dep't of the Air Force v. Rose, 425 U.S. at 372 n.9. In these circumstances, Exemption 7(C) must be construed to provide the effective protection Congress intended.[12]

To support the argument that Exemption 7(C) should be construed narrowly, two amicus briefs cite *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). Reporters Committee Brief at 7-8; Silha Center Brief at 9-10. But these cases did not involve Exemption 7(C). Moreover, in *John Doe* the Court stated generally that, in construing Exemption 7, it "has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirement in determining whether the Government has properly invoked a particular exemption. . . . In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect." 493 U.S. at 157.

In *F.B.I. v. Abramson*, 456 U.S. 615 (1982), the Court rejected a "tenable construction" of Exemption 7 adopted by the court below -- a construction that would have required public disclosure of certain documents relating to an FBI investigation -- in favor of an "equally plausible" interpretation that more accurately reflected congressional intent, was more consistent with the structure of the Act, and "more fully preserves the purposes of the statute." *Id.* at

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12 The claim by the Association of American Physicians & Surgeons that Exemption 7(c) is not animated by any public policy (see Brief at 5, 12) is simply wrong. The statutory language, its legislative history, and subsequent interpretations shows clearly that protection of private information the government may hold is the public policy of the United States.

624, 625. Both *John Doe* and *Abramson* are inconsistent with the argument that Exemption 7 must be narrowly construed without regard for Congress' intent to afford meaningful protection to privacy interests.

III. No Legitimate Public Interest Supports Disclosure Of The Photographs

1. One amicus brief asserts generally that there is a public interest in the unnatural death of a high government official involved in a major political controversy and in the conduct of ensuing government investigations. Reporters Committee Brief at 8. But those observations do not automatically establish a public interest in disclosure of the photographs that Favish seeks. Nor does that argument establish that, if such a public interest exists, it outweighs the invasion of privacy that disclosure would entail.

In conducting the balance *Reporters Committee* requires, the Court must consider all relevant factors. These include the fact that there have been five previous investigations of the Foster death, including one by an Independent Counsel who demonstrably had no interest in protecting the Clinton Administration that Mr. Foster served. Pet. App. 26a-29a. Also relevant is the fact that Favish seeks these photographs primarily to establish the type of wound Mr. Foster suffered (Favish Brief at 41-46) -- although photographs revealing this information would be so gruesome and graphic that even the Ninth Circuit was unwilling to require their disclosure. On the other hand, the four photographs that the Court ordered released, according to the Vaughn index and the District Court's description of them, reveal nothing about an exit wound. JA 45a-46a. The Ninth Circuit's determination that release of those four photographs was in the public interest is thus inexplicable.

2. To justify disclosure, Favish and some amici briefs recite a litany of criticisms of the various

investigations into Foster's death. All of these were answered fully by the Fiske and Starr reports.[13] Moreover, aside from the contention regarding the location of the exit wound, Favish and amici do not explain how most of the death scene photographs would have any relevance to various criticisms he raises.[14] Thus Favish discusses whether a car identified in the parking lot of Fort Marcy Park was gray (the color of Foster's car) or brown; who was in attendance at the autopsy; and whether the x-ray machine used at the autopsy was functioning properly. Favish Brief at 28-29, 29-30, 37-40. But Favish fails to explain how death scene photographs of the body would be relevant to the issues he raises about these matters.

Similarly, one amicus brief argues that the photographs should be made public because Foster's fingerprints were not on the gun and there were rug fibers on his clothes. Ass'n of Am. Physicians & Surgeons Brief at 13. But neither Favish nor amici explain how the photographs of Foster's body would show whose fingerprints were on the gun[15] or the origin of the rug fibers found on his

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[13] *See* Petitioner's Brief at 36-37 n.21.

[14] Favish does purport to explain the relevance of the photograph of Foster's hand holding the gun he used to shoot himself. Favish Brief at 40-41. He argues that this photograph might show whether there was blood on the gun, as might be expected in a suicide. But the Starr Report states that traces of Foster's blood were found on the gun, and that there was blood spatter on the fingerprint lift tape used on the weapon. JA 138-40. Moreover, Favish already has a black-and-white copy of that photograph, leaked to the media and published in Time and Newsweek and on ABC Television. Favish does not explain why the color original would show him more, other than to assert (without support) that the published copy is "degraded." Favish Brief at 40. There is no basis for Favish's attempt to manufacture a controversy on this issue.

[15] The Starr Report explains that the handle grip area of the gun was textured and thus not the type of surface that commonly allows identifiable fingerprints. JA 140-41. Moreover, the farfetched nature of Favish's speculations is exemplified by his mystifying contention that, in

clothes.[16] Other assertions by amicus Association intended to disparage the findings of suicide simply are devoid of truth.[17]

Moreover, Favish's lengthy discussion of why he believes the Starr Report is unreliable is based on numerous documents that he obtained from the government -- FBI reports, medical reports, service records of the x-ray machine at the coroner's office, and numerous witness statements. Favish Brief at 18-40. While his critique of the Starr Report falls woefully short, the important point is that he already has received a large number of documents that have enabled him, and the public, to evaluate the report. The FOIA thus has served its function of enabling an independent evaluation of the investigation of Foster's death. There is no showing

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order to obtain a positive (albeit erroneous) identification of the gun that Mr. Foster used to take his life, Independent Counsel Starr "deceptively" showed Lisa Foster the wrong gun. Favish Brief at 23-24. There is no hint why Mr. Starr would do that.

[16] The Starr Report states that, of the 35 carpet fibers found, 23 fibers were consistent with the white carpet in Foster's home; four fibers were consistent with carpets in the White House or Foster's car; while the variety of colors of the non-white fibers "suggests that these fibers did not originate from a single carpet." Accordingly, the carpet fiber evidence "does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20." J.A. 154-56.

[17] The Association's claim (Brief at 12) that Mr. Foster's behavior before his death was not consistent with suicide overlooks the finding by both Starr and Fiske that Mr. Foster was suffering from depression. JA 195-208; *Fiske Report* 21-22, 51. Moreover, the Starr Report shows Mr. Foster had received medication for depression from a Little Rock, Arkansas doctor and obtained the names of three Washington area psychiatrists from his sister, Ms. Anthony. The Association's claim (Brief at 12-13), unsupported by any evidence or citation, that Mr. Foster's note found several days after his death was a forgery also is refuted by the Starr Report. JA 205-206 n.338 (summarizing handwriting analyses by FBI Laboratory, U.S. Park Police, and an independent handwriting expert).

that the additional disclosure of these photographs would add significantly to the information already made available.

3. One amicus brief argues that unsupported allegations of governmental misconduct should be sufficient to override the Foster family's privacy interest, because otherwise Favish will be denied the very material he needs to prove his allegations. Reporters Committee Brief at 15-18. But unsupported allegations are easy to make. If such allegations were sufficient to overcome privacy interests affected by investigative records, the protection afforded by Exemption 7(C) essentially would be meaningless. Moreover, in a case where a wealth of material already has been released, a requester's failure to adduce significant information from such material demonstrating the need for further, privacy-invading disclosures is particularly telling.[18]

4. One amicus brief argues that the Electronic Freedom of Information Act of 1966 (EFOIA), which established that records in an electronic format are subject to FOIA, overruled the *Reporters Committee* case and established that "any private purpose" could be utilized in an attempt to override a privacy interest implicated by federal investigative records. Reporters Committee Brief at 23-27. (This brief surprisingly fails to cite the sole court of appeals decision which addressed this argument and rejected it. *O'Kane v. United States Customs Serv.*, 169 F.3d 1308 (11th Cir. 1999).[19]) This brief relies on a statement in the "Findings and Purposes" section of EFOIA that the purpose of FOIA was to make certain agency information available to the public "for any public or private purpose." Pub. L. 104-231, § 2(a)(1), 110 Stat. 3048 (1996). But that statement merely reaffirms long-standing FOIA law that any member of the public has a right to non-exempt government records, regardless of his or her purpose. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Under *Reporters Committee*, a public purpose is required only where privacy interests are implicated and a privacy exemption claimed. The congressional findings in EFOIA acknowledge that rule, stating that the public may obtain access to information for any public or private purpose "subject to statutory exemptions." Pub. L. 104-231, § 2(a)(1), 110 Stat. 3048 (1996). Nothing in EFOIA purports to amend the statutory exemptions, including Exemption 7(C), and nothing in the legislative history demonstrates an intent to cut back on the FOIA's protection of privacy.

Moreover, this case does not present the issue whether a requester's private interest may be considered in determining if release of investigative records invading privacy is warranted. Favish does not claim that his morbid curiosity about Mr. Foster's death constitutes a separate private interest that would outweigh the Foster family's privacy interest. The only interest Favish asserts is the public interest in Mr. Foster's death and the ensuing government investigations. For the reasons previously discussed, that interest is insufficient to outweigh the Foster family's significant privacy interest against public release of the photographs. But if, indeed, the FOIA allowed balancing

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[18] One amicus also argues that the government could hide records by falsely claiming that their release could be reasonably expected to invade personal privacy. Reporters Committee Brief at 21-23. However, the requirement to submit a description of withheld documents, and the availability of in camera inspection in appropriate cases, provide adequate safeguards against that kind of government conduct. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989).

[19] The Reporters Committee appeared as amicus in *O'Kane*. 169 F.3d at 1309.

of a private interest in disclosure against privacy interests against it, Respondent Favish would not prevail. His ghoulish fascination with Mr. Foster's death certainly would not outweigh the family's privacy interest in preventing dissemination of these extremely disturbing photographs by the media and on the Internet.

CONCLUSION

The portion of the judgment of the court of appeals ordering release of four photographs should be reversed.

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SEP 24 2003

No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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OFFICE OF INDEPENDENT COUNSEL, PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In the decade since the death of Vincent Foster, there have been five official investigations into the circumstances of his death, each of which concluded, based on overwhelming evidence, that Foster committed suicide. See Gov't Br. 2-5. Thousands of pages of evidence, testimony, and analysis, and more than a hundred photographs arising from those investigations have been released, apprising the public, in minute detail, of the government's conduct, processes, operations, and activities in the course of those investigations.

Respondent Favish (respondent) and his amici interpret FOIA as commanding the disclosure of all "the raw evidence" (Resp. Br. 19) from the investigations, because the government "may or may not" (Rep. Comm. Br. 13) have misstepped. FOIA's central purpose, however, is not to maximize the disclosure of all information in the government's possession, but to permit the "fullest *responsible* disclosure," *EPA* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)) (emphasis added), of information about the operations and activities of

the government without "harm[ing]" the interests of private individuals, *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). Exemption 7(C) thus requires more than the mere articulation of insubstantial suspicions of governmental misconduct before FOIA requesters can obtain records that intrude upon the privacy of individuals. That is because, in Congress's view, "the value of an informed citizenry" should not come at the expense of "the privacy of those same citizens." S. Rep. No. 221, 98th Cong., 1st Sess. 3 (1983).

A. Disclosure Of The Photographs Could Reasonably Be Expected To Intrude Upon The Surviving Family Members' Privacy

Neither respondent nor his amici seriously dispute the emotional harm and disruption that public release of the photographs of Foster's body would cause his family members. Nor do respondent and his amici deny the lack of any established tradition of access to law-enforcement photographs and similar records of the dead and dying. Respondent and his amici nevertheless assert that the same Congress that strove to "exclu[de] those kinds of files the disclosure of which might harm the individual," H.R. Rep. No. 1497, *supra*, at 11, and to adopt "common sense" protections for the "privacy of individuals," S. Rep. No. 221, *supra*, at 21-22, categorically forbade courts to accord any consideration whatsoever to the intrusion on privacy that close family members would suffer by the public dissemination of records like the Foster death-scene photographs.

1. Respondent and his amici's cramped vision of FOIA's privacy protection has no home in Exemption 7(C)'s text. The exemption, by its plain terms, broadly protects against any and all forms of unwarranted invasions of "personal privacy" caused by the production of records. 5 U.S.C. 552(b)(7)(C). Respondent and amicus Silha Center argue (Resp. Br. 4; Silha Br. 5-6) that FOIA's privacy protection extends only to individuals "explicitly mentioned" (Silha Br. 5) in law-enforcement records. But nothing in the ordinary understanding of the phrase "personal privacy" supports that limitation. If Congress had wished to limit Exemption 7(C) in that manner, it would have written the exemption to protect "the personal privacy of the individual or individuals described in the records."

Congress did not write the exemption that way because its purpose was broader. While modern-day government needs a vast amount of personal information to function (both in law enforcement and in the administration of such programs as Medicare, Medicaid, and Social Security), access to such information generally is not needed for the public to understand and evaluate governmental operations. Congress thus wanted to ensure that, in the course of opening the government to greater scrutiny, it did not open the private lives of others to unwarranted scrutiny. See S. Rep. No. 221, *supra*, at 3 ("No one questions the value of an informed citizenry; nor should anyone question the government's obligation to respect the privacy of those same citizens.").

For that reason, the privacy exemptions have, for more than thirty years, been understood to "includ[e] members of the family of the person to whom the information pertains." *Attorney General's Mem. on the Public Info. Section of the Administrative Procedure Act* 36 (June 1967); see also *Attorney General's Mem. on the 1974 Amendments to FOIA* 9 (Feb. 1975) (Exemption 7(C) protects "person[s] mentioned in the requested file," and "*also* protects relatives or descendants of such persons") (emphasis added). This Court took the same approach in *Department of State* v. *Ray*, 502 U.S. 164 (1991), in considering the embarrassment that disclosure

of the identities of returned Haitian nationals could cause for those nationals "or their families," *id.* at 176.[1]

It is common sense—and a "common sense" conception of privacy is what Congress intended, S. Rep No. 221, *supra*, at 22—that law enforcement files and other governmental records may contain information or allegations about such matters as an individual's extramarital affairs, sterility, diseases, or sexual predilections, the disclosure of which would implicate the privacy of not just the named individual but also of his or her spouse and (reputed) children, whether they are expressly mentioned in the file or not. Indeed, respondent concedes (Br. 15) that privacy protection should extend to such "appropriate situations" as records documenting a genetic disorder or a sexually transmitted disease. Having thus acknowledged that Exemption 7(C)'s reference to "personal privacy" includes, in appropriate situations, the privacy interests of family members that are not mentioned by name in the requested record, respondent's text-based challenge to the protection of survivors' privacy interests collapses.[2]

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[1] Amicus Silha Center suggests (Br. 13) that this Court's reference in *Ray* pertained only to those select family members who were mentioned by name by a few of the returned nationals during their interviews with State Department officials. That argument ignores that the State Department broadly asserted, and this Court sustained, Exemption 6's privacy protection because of the harm that could befall *all* of the returned nationals and their families. See Eaves Decl., J.A. 43, *Department of State* v. *Ray*, No. 90-747 ("To disclose the identities of these individuals [all of the interviewed nationals] would not only betray their trust in our discretion, it would also subject them or their families to possible embarassment [sic] in their social and community relationships."). The harsh reality was that, if foreign government officials or paramilitary groups were inclined to engage in retaliatory attacks, they would hardly distinguish between those family members named in an interview and those who were not.

[2] In fact, the arguments of respondent and his amici are at war with each other. The same plain text that amicus Silha Center insists precludes the protection of *any* survivor privacy interests (Br. 5-6), respondent reads as protecting survivor privacy in "appropriate situations" (Resp. Br. 15), and amicus American Association of Physicians and Surgeons (AAPS) reads (Br. 13-14) as exempting autopsy records and photographs from disclosure as medical records. The latter argument fails because FOIA contains no general exemption for medical records. It exempts medical records only if their production "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). If, as AAPS also argues (Br. 7), all personal privacy rights die with the subject of the record and FOIA does not protect the privacy interests of survivors, then labeling autopsy photographs medical records does nothing to prevent their disclosure.

2. Unable to find a textual anchor for excluding the privacy interests of survivors from Exemption 7(C)'s aegis, respondent (Br. 10-11) and his amici (Silha Br. 8-9; American Ass'n of Physicians & Surgeons (AAPS) Br. 7-8) complain that survivors' privacy interests have an insufficient pedigree in tort law. That argument is both irrelevant and wrong.

It is irrelevant because FOIA's personal privacy protections extend beyond constitutional and tort-law conceptions of privacy to embrace personal information that is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763-764 (1989) (quoting *Webster's Third New Int'l Dictionary* 1804 (1976)). It is the "practical obscurity" of such information and its "hard-to-obtain" character, rather than the protection afforded it by the common law of tort, that creates a FOIA-protected privacy interest against its broad disclosure to the public. *Id.* at 762, 764. The "privacy values" that FOIA embodies, moreover, include protecting individuals from "embarrassment," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377 (1976), due to the revival of "wholly forgotten" past events, *id.* at 381, and any "retaliatory action" or even attempted

"interview[s]" by third parties that disclosure might bring about, *Ray*, 502 U.S. at 177.

Exemption 7(C)'s protection for third parties thus turns upon the fact that an "injury" or "harm" could arise "from the unnecessary disclosure of personal information," *Washington Post*, 456 U.S. at 599, rather than the particular form that the injury assumes. The desire of family members to limit or prevent public viewing of the deceased, to conduct their grieving out of the public eye, and to avoid the emotional pain and intrusion on memories of the beloved that would result from the government's dissemination of death images falls squarely within the range of privacy values recognized by this Court in earlier FOIA cases.[3]

The argument of respondent and his amici is wrong because those same interests have found solid recognition in state law. Indeed, one of the very first tort cases ever to address the right of privacy involved a survivor's claim for protection against the mental distress and upset occasioned by an unauthorized use of the deceased's image. In words that presaged the consistent holdings of courts recognizing survivor privacy under FOIA (see Gov't Br. 23-24), New York's highest court explained:

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Schuyler v. *Curtis*, 42 N.E. 22, 25 (N.Y. 1895). While the court ultimately found that the asserted injury in that case was not reasonable and thus not actionable, *id.* at 26, the court stressed that a survivor's "privacy" would be violated by actions "such as might be regarded by reasonable and healthy minds" as causing "injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts," *id.* at 27.

Numerous other jurisdictions followed suit both as a matter of state tort law and state statutory protection.[4] The Restatement of Torts likewise recognizes that publication of a photograph of a deceased infant—a hypothetical "child with two heads"—over the objection of the mother results in an invasion of the mother's privacy, at least where the connection between the mother and the child is made apparent to the public. Restatement (Second) of Torts § 652D, at 387 (1977). The unreasonableness of publicity given to

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[3] Indeed, in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), and *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam), the Court held that FOIA's privacy protection encompasses the disruption in individuals' daily lives that would be caused by unwanted solicitations if their home addresses were released. That protection from disruption and intrusion is very much akin to the "disruption of * * * peace of mind" that forms the core of survivors' privacy interests. *New York Times Co.* v. *NASA*, 782 F. Supp. 628, 632 (D.D.C. 1991). See also *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624 (1995) (acknowledging the State's "substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact").

[4] See Gov't Br. 24-27 & n14; *New York Times Co.* v. *City of New York Fire Dep't*, 754 N.Y.S.2d 517, 523 (Sup. Ct. 2003) (911 tapes and transcripts of World Trade Center victims' "calls for help in extremis should be protected as private utterances for the sake of both the victims who died, and their surviving family members"); *Bazemore* v. *Savannah Hosp.*, 155 S.E. 194 (Ga. 1930) (recognizing parents' privacy interest in photographs of deceased child's body); see also A. Westin, *Privacy and Freedom* 36 (1967) ("[E]motional release through privacy plays an important part in individual life at times of loss, shock, or sorrow.").

private matters, the Restatement explains, must take into account "the customs and conventions of the community." *Id.* at 391. As explained in the government's opening brief (at 26-28), this Nation's customs and habits have traditionally denied public access to autopsy or crime-scene photographs and similar depictions of individuals immediately prior to or in the throes of their death, and have afforded family members control over the body and image of the deceased, respecting the privacy of their funereal decisions, grieving process, and memories of the departed.

Respondent argues (Br. 4, 10) that recognition of privacy rights in survivors is somehow illegitimate because the injury that the privacy right addresses can be described as "emotional distress." And so it can. But that is no different from the type of emotional injuries that triggered protection under FOIA's privacy exemptions in *Ray* and *Rose*. *Ray*, 502 U.S. at 176 (protection against "embarrassment in their social and community relationships"); *Rose*, 425 U.S. at 377 ("embarrassment, perhaps disgrace"); see also *Rose* v. *Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information."), aff'd, 425 U.S. 352 (1976). What respondent's argument fails to appreciate is that the invasion of privacy tort was conceived to protect against emotional harms, rather than harm to physical or property interests. See, *e.g.*, S. Warren & L. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890) (urging protection against "mental pain and distress"); *id.* at 205 (protection of "thoughts, sentiments, and emotions"). Indeed, privacy often is distinguished from other torts precisely because it protects "against mental distress that accompanies undesired publicity," rather than pecuniary or proprietary interests. J.T. McCarthy, *The Rights of Publicity and Privacy* § 5:61, at 5-112 (2d ed. 2003) (internal quotation marks omitted); see also

Restatement, *supra*, § 652C, at 381 ("[T]he protection of [an individual's] personal feelings against mental distress is an important factor leading to a recognition of the [privacy] rule.").

Amicus Silha Center objects on policy grounds to Exemption 7(C)'s inclusion of survivors' privacy interests, arguing (Br. 11) that it would "erect an even higher barrier for requesters" than that established by *Reporters Committee*. But the question is not whether survivors' privacy should get special recognition; it is whether that interest will receive any recognition at all under Exemption 7(C), an exemption that Congress "intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Contrary to Silha Center's argument (Br. 22), the fact that the privacy interest exists does not mean that it will control and lead to "unjustified withholding." It means only that the traditional balancing of interests under *Reporters Committee* takes place before law enforcement photographs and recordings of the dead and dying may be released to the public.[5]

In short, the right of survivors to privacy, which has been broadly recognized under FOIA (see Gov't Br. 22-24 & n.12), has much deeper roots in tort law, and at least equivalent (if not deeper) roots in statutory protection, than the rap sheets this Court held to be protected against disclosure in *Reporters Committee*, the Air Force honor hearing summaries protected in *Rose*, the home addresses protected in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), and the

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[5] Silha Center's concern (Br. 22-24) that survivor privacy interests will impose an undue burden on the government is misplaced. The Executive Branch has protected survivors' privacy interests under FOIA for decades without encountering such burdens, largely because the amount of information in government hands and the circumstances surrounding its collection make the identification of survivors relatively straightforward in practice.

information about "place of birth, date of birth, date of marriage, employment history, and comparable data" that this Court held protected under FOIA's privacy exemptions in *Washington Post*, 456 U.S. at 600. The court of appeals' recognition (Pet. App. 13a) that Foster's survivors have interests protected under Exemption 7(C) thus tracks this Court's settled FOIA jurisprudence. Tellingly, Congress—which has not hesitated in the past to amend FOIA in response to judicial decisions and which already has amended Exemption 7 twice—has never seen fit to amend the law to overturn that widespread appellate precedent. By contrast, respondent and his amici, in urging this Court to reject survivor privacy interests that are already protected by state tort law, state statutory law, and established custom and practice, press the very type of "overly literal interpretation" of the privacy exemption that Congress eschewed as ill-equipped to protect private individuals from harm through FOIA disclosures. S. Rep. No. 221, *supra*, at 22.

B. Release Of The Photographs Of Foster's Body At The Scene Of His Death Would Not Significantly Advance The General Public Interest In Understanding Governmental Activity

Under Exemption 7(C), the family's privacy interest must be weighed against the public interest in disclosure of the documents to determine whether invasion of that privacy interest would be warranted. *Reporters Committee*, 489 U.S. at 762. The "only relevant public interest," *Department of Defense* v. *FLRA*, 510 U.S. at 497, to be weighed is the extent to which disclosure of the requested documents would "contribute *significantly* to public understanding of the operations or activities of the government," *Reporters Committee*, 489 U.S. at 775 (emphasis added). Respondent has failed to establish the existence of any such public interest.

1. Respondent has asserted a public interest in uncovering deficiencies or "misfeasance" in the Independent Counsel investigations into Foster's death. Pet. App. 10a-11a, 58a. In particular, respondent contends (Br. 19) that the government investigations were "deceptive and untrustworthy," making it "necessary for the public to see the raw evidence."

That contention cannot be reconciled with this Court's decision in *Ray*. In that case, a FOIA requester sought unredacted interview reports of returned Haitian nationals, in part to verify whether the government's conclusion that the returned nationals were not being subjected to retaliation was accurate. In the absence of record evidence "impugn[ing] the integrity of the reports," however, this Court was "unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports." 502 U.S. at 179. The Court reasoned that, "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Ibid.* See also *Reporters Committee*, 489 U.S. at 774 (allegations that a reputed organized crime figure "had improper dealings with a corrupt Congressman" were insufficient to overcome the privacy interest in a rap sheet).

While amicus Reporters Committee argues (Br. 14-15) that allegations of corruption alone should suffice because of the public interest in exposing governmental misconduct, *Ray* makes clear that FOIA does not override the presumption of regularity that attaches to the actions of government officials, including the five investigations into Foster's death. See 502 U.S. at 179 ("We generally accord Government records and official conduct a presumption of legitimacy."). Accordingly, when a FOIA request seeks private informa-

tion about third parties based on asserted governmental misconduct, there must be clear evidence of that misconduct to overcome the presumption of regularity, in the form of new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance. See Gov't Br. 37-38.

Respondent and his amici are quick to criticize that test, but they are unable to identify any alternative standard, leaving this Court only the Ninth Circuit's hollow inquiry into whether the FOIA requester has articulated suspicions that "if believed, would justify his doubts" (Pet. App. 11a)—which, by definition, they always will. In any event, their criticisms of the clear evidence standard miss the mark.

First, Reporters Committee errs in arguing (Br. 11) that the "clear evidence" standard is "made * * * up out of whole cloth." It is drawn directly from longstanding precedent of this Court establishing the type of showing needed to overcome the presumption of regularity. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *United States* v. *Nix*, 189 U.S. 199, 206 (1903).

Second, in applying the clear evidence standard in the FOIA context, Reporters Committee finds the requirement that the FOIA requester identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance to be too stringent. But Reporters Committee offers no explanation for why allegations of missteps or misconduct that have been repeatedly refuted should be sufficient to overcome the privacy interests of third parties. Amicus AAPS argues (Br. 3) that they should because any time the government addresses and answers such allegations, it may engage in self-exoneration. Putting aside the district court's finding that each independent inquiry into Foster's death was, in fact, focused on identifying any error in the government's initial investigation, see Gov't Br. 36,

the presumption of regularity cannot be overcome simply by piling on such additional speculation about possible irregularity.

Nor do amici explain why a FOIA requester's allegations of governmental misconduct need not be "credible" or "objectively reasonable." This Court ruled in *Ray* that subjective curiosity about the veracity of the government's reports was insufficient. Beyond that, it is difficult to understand why, as Reporters Committee contends (Br. 15), "obvious [c]onsiderations of fairness" dictate that *incredible* or *unreasonable* allegations of governmental misconduct should suffice to overcome third-parties' privacy interests. Certainly considerations of fairness for those third parties whose privacy is at stake do not.

Amici's objections reduce to no more than an aversion to having to show anything beyond the assertion or speculation of wrongdoing to justify the invasion of personal privacy that disclosure would entail. Reporters Committee fears (Br. 15) that requiring any additional showing will deter FOIA requests where "the only material that would yield credible evidence of government misconduct is precisely the material that has been requested." But if there is no evidence of governmental misconduct, then the mere hypothesis that a record might reveal it is insufficient. That is the holding of *Ray*. Reporters Committee's core objection is not to the government's reading of FOIA; it is a disagreement with the presumption of regularity itself.

Beyond that, the requirement of clear evidence does not apply to all FOIA requests. It applies only to those FOIA requests that seek the disclosure of records implicating the personal privacy of third parties. In addition, Reporters Committee's argument overlooks that the agency has an independent obligation to identify and balance any relevant public interest in deciding whether to invoke Exemption 7(C). Accordingly, where the government's files themselves

contain clear evidence of governmental wrongdoing, no separate showing by the requester will be required.[6]

In those cases where disclosure could reasonably be expected to intrude on personal privacy, there is no such evidence of governmental misconduct, and no other public interest is identified, Exemption 7(C) provides for withholding if the invasion of privacy would be "unwarranted." The whole point of that balancing of interests under Exemption 7(C) is to require some showing to establish that the invasion of privacy is warranted. A balance that requires nothing of meaningful weight on the other side is no balance at all—it is "effectively an irrebuttable presumption" (Rep. Comm. Br. 14) in favor of invading the privacy of third parties. See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (privacy interests should be balanced against, not "substantially subordinated" to, the interest in disclosure).[7]

Third, Reporters Committee argues (Br. 13) that mere allegations (or already refuted, incredible, or unreasonable ones) should suffice simply because disclosure of the records "may or may not" reveal a "government coverup" or "an official's abuse of his position." The latter point may be true, but only because it is tautological: every request for

[6] See, *e.g.*, Department of Justice, Office of Info. & Privacy, *Freedom of Information Act Guide and Privacy Act Overview* 352-353 (May 2002) (discussing policy for disclosing the results of investigations by the Office of Professional Responsibility where those investigations uncover "intentional or knowing professional misconduct").

[7] For that reason, Reporters Committee's contention (Br. 13) that FOIA requesters should not have to show more to overcome the presumption of regularity than is necessary to obtain discovery in civil litigation fails. Application of Exemption 7(C)'s balancing test is not some preliminary stage in FOIA litigation; it resolves the merits of the case and the individual's entitlement to privacy. Furthermore, courts have the authority to fashion protective orders to prevent unwarranted intrusions on privacy in the course of civil discovery. Fed. R. Civ. P. 26(c). FOIA disclosures cannot be limited; they must be made to the public at large.

documents "may or may not" confirm the government's own description of its activities. Thus, respondent's argument (Br. 18) that the photographs at issue here should be released because they will be either "consistent" or "inconsistent" with the five unanimous investigatory findings of suicide reduces the required showing of a public interest in disclosure to a pleading requirement.

Fourth, respondent and Reporters Committee contend that the public is entitled to "see the raw evidence" in a law enforcement investigation (Resp. Br. 19), because in their view, "the purpose of the FOIA is to allow the public to see for itself what underlies the government's pronouncements" (Rep. Comm. Br. 14). The purpose of FOIA, however, is to allow the public to "*understand*[] * * * the operations or activities of the government," not to duplicate them. *Reporters Committee*, 489 U.S. at 775 (emphasis added). FOIA does not deputize requesters as independent counsels entitled to undertake their own shadow investigations of any law-enforcement operation that interests them. The thousands of pages of reports, witness testimony, evidence, and analysis, and more than one hundred photographs that have already been released to the public in conjunction with the inquiries into Foster's death, have provided the public detailed insight into the operations and activities of investigators in the Executive and Legislative Branches, as well as two Independent Counsel. The fact that respondent is not persuaded by the unanimous conclusions of those investigations is beside the point. FOIA's purpose is to promote an informed citizenry, not to achieve universal agreement.[8]

[8] For the reasons outlined in the government's opening brief (at 36-37 nn.21-22), respondent's list of his disagreements with the Independent Counsel investigations does not satisfy the clear evidence standard. Respondent's attempt to find fault in who attended the beginning of the autopsy (Br. 28-29) is meaningless given the repeated and consistent analyses and endorsements of the autopsy's substantive procedures and

2. As explained in the government's opening brief (at 41-44), the court of appeals deemed irrelevant to the public interest prong of the Exemption 7(C) balance the amount of information already released to the public. Pet. App. 11a. That aspect of its holding cannot be reconciled with this Court's decision in *Ray*, which specifically sustained a withholding on privacy grounds in part because the "public interest has been adequately served by disclosure of the redacted interview summaries." 502 U.S. at 178. Respondent and his amici do not seriously contend otherwise. Reporters Committee instead raises the specter (Br. 21) of diversionary releases by the government of "large quantities of relevant (or even not particularly relevant) information while holding back the most embarrassing or damaging material." That argument is without merit. In the first place, the release of "large quantities of *relevant* * * * information" is precisely what this Court held in *Ray* is pertinent to the Exemption 7(C) analysis.

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conclusions. See Starr Report, J.A. 128-134; Robert B. Fiske, Jr., *Report of the Independent Counsel: In re Vincent W. Foster, Jr.* 37 (June 30, 1994) (*Fiske Report*); S. Rep. No. 433, 103d Cong., 2d Sess. 26-29 (1995). In any event, any departure from protocol by the *Virginia* Medical Examiner would not constitute clear evidence of misconduct by the *federal* government. See *Reporters Committee*, 489 U.S. at 774. For those same reasons, respondent's comments (Br. 27-28, 34-37) about the report filed by an employee of the Virginia Medical Examiner's office (the Haut Report) are unavailing. See also *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120, 124 (D.C. Cir. 1999) (finding respondent's contentions about the Haut Report to be "considerably below the threshold" needed to suggest that "any government actor has behaved illegally"), cert. denied, 529 U.S. 1111 (2000). Respondent's concerns about the identification of Foster's car (Br. 29-31) and autopsy X-rays (Br. 37-40) have all been thoroughly probed. See Starr Report, J.A. 175-176 (explaining absence of X-rays and the lack of need for them); J.A. 187-189 (explaining identification of Foster's car at Fort Marcy Park and addressing variations in witness accounts); *Fiske Report* 29-36 (similar); S. Rep. No. 433, *supra*, at 28 & n.98 (addressing lack of X-rays).

Second, Reporters Committee offers no basis for its suggestion that the government has ever engaged in the sort of disclosure machinations and "evasional document release[s]" (Rep. Comm. Br. 23) that it hypothesizes, and it would be contrary to the presumption of regularity to fashion a rule of law on the premise that the government might do so. Certainly the present case provides no foundation for that claim. It blinks reality to suggest that the thousands of pages of records and materials already released devoted specifically to the cause of Foster's death and the reliability of the government's investigations into it are "only tangentially relevant" (*ibid.*) to the public's interest in those very same subjects. Furthermore, FOIA's provisions for de novo judicial review of exemption claims, the requirement of *Vaughn* indices, and the availability of *in camera* review have ensured for decades that withholdings are limited to legitimately protected material.

Finally, there is no merit to Reporters Committee's contention (Br. 21) that the more material the government releases and the more thoroughly the government probes a matter, the greater the need for total and complete disclosure because "something further [may] remain[] to be ferreted out." That proposed construction of FOIA, a statute designed to promote responsible openness in government, would create perverse incentives by making an inability to protect the legitimate privacy interests of individuals the price of forthcoming and comprehensive disclosures.

3. The government's opening brief (at 46-49) also explains that the disclosure ordered by the Ninth Circuit was improper because photographs of Foster's right shoulder, arm, and torso bear no nexus to the (already refuted) assertions respondent makes about the Independent Counsel investigations. They can shed no light on respondent's litany of complaints about the gun identification procedures employed by law enforcement investigators (Resp. Br. 21- 27),

the contents of the Haut Report (*id.* at 27-28, 34-37), attendees at the autopsy (*id.* at 28-29), Foster's car in the Fort Marcy parking lot (*id.* at 29-31), the credibility of one of Independent Counsel Starr's experts (*id.* at 31-32), an FBI memo about the exit wound (*id.* at 32-34), or the absence of autopsy X- rays (*id.* at 37-40).

Beyond those complaints, respondent asserts (Br. 40) only that one photograph might establish why the gun remained in Foster's hand. But the investigations already explain that. Starr Report, J.A. 141-143 (gun shot residue and indentations on thumb both prove that Foster fired the gun and explain why the gun remained in his hand), *Fiske Report* 34, 50 (same). And respondent's perceived "mystery about the blood flow patterns" (Br. 46) is no mystery to trained experts. See Starr Report, J.A. 162-168.

4. Unable to prevail within the framework of this Court's precedent, Reporters Committee argues that this Court should overrule the holding in *Reporters Committee* that the public interest side of the Exemption 7(C) balance focuses on the extent to which the requested materials shed light on the operations or activities of the government. In doing so, Reporters Committee relies on a general statement about the purpose of FOIA in the 1996 Electronic Freedom of Information Act, which reconfirms the "right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose." Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048.

Principles of *stare decisis* are "most compelling" when the Court confronts "a pure question of statutory construction." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991). Reporters Committee thus bears a heavy burden "of showing that the legislature intended such a change," *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989), which it has not met.

First, the 1996 statement of congressional purpose neither amends nor addresses Exemption 7(C). The cited statement merely reaffirms the long-established proposition that the propriety of a FOIA request, in the first instance, does not turn upon the "purposes for which the request for information is made" or the identity of the requester—a proposition established by the very decision that amicus insists Congress intended to overrule. *Reporters Committee*, 489 U.S. at 771. The text of the 1996 congressional statement, moreover, makes clear that it is speaking to that general rule, which itself remains "subject to statutory exemptions," Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048, rather than to the operation of the exemptions themselves.[9]

Second, with respect to the FOIA generally, and the 1996 amendments in particular, Congress knows how to express its dissatisfaction with judicial constructions of the FOIA when it wants to, and when it does, it does not do so elliptically. See, *e.g.*, H.R. Rep. No. 795, 104th Cong., 2d Sess. 21 (1996) (stating that this section "would overrule *Dismukes* v. *Department of the Interior*, [603 F. Supp. 760, 763 (D.D.C. 1984)]."

Third, this Court has continued to apply the *Reporters Committee* standard after the 1996 amendments. See *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam). See also *O'Kane* v. *United States Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (rejecting the precise argument advanced by Reporters Committee here). In

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[9] In fact, the same Congress that crafted the Exemption 7(C) provision at issue in *Reporters Committee* also laid a statutory foundation for that decision's identification of the relevant public interest under Exemption 7(C). See 5 U.S.C. 552(a)(4)(A)(iii) (in fee provision, "disclosure of the information is in the public interest [if] it is likely to contribute significantly to public understanding of the operations or activities of the government"). Reporters Committee's argument thus requires the conclusion that "public interest" means one thing in subsection (a) of FOIA and a different thing in subsection (b).

short, "the quoted statement of congressional findings is a rather thin reed upon which to base" an overruling of fourteen-year-old precedent, where Congress's intent to change the law is "neither expressed nor, we think, fairly implied in the operative sections of the Act." *National Org. For Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994).

Reporters Committee also invokes (Br. 25) the "additional views" in the Senate Report of Senator Leahy, who criticized *Reporters Committee*. But those views were just that—the additional views of a single Senator, to which no one else subscribed. Reporters Committee stresses (Br. 25) that Senator Leahy was "the sponsor" of the 1996 amendments. In reality, he was but one of several sponsors of the legislation. See, *e.g.*, S. Rep. No. 272, 104th Cong., 2d Sess. 5-6 (1996). The fact that none of those other sponsors (or any other Senator, for that matter) expressed agreement with Senator Leahy's views thus says as much, if not more, than Senator Leahy's lone comments. In any event, the "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), much less in overturning settled precedent of this Court.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, that portion of the judgment of the court of appeals ordering the release of four photographs should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2003

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No. 02-954

In The
Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* TERESA EARNHARDT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37(3)(b), Teresa Earnhardt moves for leave to file the attached brief as *Amicus Curiae* in support of Petitioner, Office of Independent Counsel and Intervenors, Sheila Foster Anthony and Lisa Foster Moody, who are members of Vincent Foster's family. Petitioner and Intervenors have consented to the filing of this brief, but Respondent, Allan Favish, has refused consent, necessitating this motion.[1]

Teresa Earnhardt is the widow of professional racecar driver Dale Earnhardt, who was killed at the Daytona International Speedway during the Daytona 500. In the two years since her husband's death, Teresa Earnhardt has become a national spokesperson for families like hers – families who have lost a loved one in a tragic death, and who then face the unimaginable pain and unwarranted intrusion into their privacy caused by the threatened public release of post-mortem photographs of their loved one's dead body, photographs taken by a governmental agency in the performance of its public duty.

Mrs. Earnhardt's efforts resulted in over two years of litigation in Florida, and prompted legislation in Florida specifically restricting access to autopsy photographs that would otherwise be considered public records. Fla. Stat. § 406.135; *see Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *rev. denied*,

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[1] Copies of the consent letters received from Petitioner and Intervenors' counsel are submitted with this Motion and *Amicus Curiae* Brief.

(Fla., July 1, 2003) (Table, Case No. SC02-1635). Dale Earnhardt's death became the cataclysmic event through which the public, and the Florida Legislature, came to recognize the need for protection of all families from exploitation by the unconstrained public dissemination of their loved one's autopsy photographs. Few courts have had the opportunity to examine this issue as have Florida courts as a result of the struggle over Dale Earnhardt's autopsy photographs.

Mrs. Earnhardt requests leave to file her brief for two reasons. First, she believes that the circumstances of her case bear directly on the principal issue of this case, which is whether the public inspection, copying and publication of post-mortem photographs (whether death scene or autopsy) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). While her focus has been on autopsy photographs, which are, as the Florida Legislature found, more grotesque than most death scene photographs in that they involve a pictorial representation of the physical dismembering of the decedent, the unwarranted invasion of personal privacy occurs with the publication and dissemination of both autopsy and death scene photographs. Further, while Mrs. Earnhardt's case arose under Florida's public records law, the detailed evidentiary findings made by Florida courts – and the Florida Legislature – confirm at the state level the analogous analysis made by federal courts under the Freedom of Information Act (the "FOIA"). Florida became one of the first states restricting access to autopsy photographs, and, as discussed in the brief, the trend seems to be to follow the reasoning of the FOIA and the new Florida legislation by balancing the intrusion upon privacy against the public interest in disclosure. Mrs.

Earnhardt believes that the discussion in her brief of the adoption of laws similar to those passed by the Florida Legislature by other states would be of interest to this Court, since death scene and autopsy photographs are far more often created by local and state agencies than by federal agencies. The significance of the state statutes and cases discussed herein is that they provide logical and actual support for the proposition that there can be a balance between the privacy interest and the public's right to know. Thus, although Mrs. Earnhardt's case involves Florida constitutional provisions protecting personal privacy (Article I, Section 23, Florida Constitution) and endorsing inspection and copying of public records (Article I, Section 24, Florida Constitution), the issues involved in balancing those rights under Florida law are similar to the FOIA's Exemption 7(C)'s analysis presented in this case of whether public inspection, copying and publication of post-mortem photographs (including death scene and autopsy photographs) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Mrs. Earnhardt's second reason for requesting leave to file the attached brief is personal. Mrs. Earnhardt's case arose in today's modern age of high-speed technology and insatiable voyeurism, an age in which the press finds privacy meaningless and nothing sacred. It is an age in which entire internet sites are devoted to the exploitation of death and where gruesome and highly disturbing photographs of autopsies and death scenes can be viewed. Mrs. Earnhardt's interest here is to make sure that other similarly situated families are protected from the unwarranted intrusion upon their privacy that is caused by the

public release of post-mortem photographs under federal or state laws granting public access to records.

Counsel for Mrs. Earnhardt have been involved in her legal struggles over her husband's autopsy photographs as well as the legislation restricting access to such photographs, and also have extensive experience with issues involving the competing interests of public access and individual informational privacy as developed under Florida law. Accordingly, Mrs. Earnhardt (and her counsel) has information, experience and insights that may well be of interest and use to this Court, and which cannot be effectively presented by the parties. For these reasons, Teresa Earnhardt respectfully moves for leave to file the attached brief as *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The question presented is:

Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs relating to the death of former Deputy White House Counsel Vincent Foster.

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BRIEF OF *AMICUS CURIAE* TERESA EARNHARDT IN SUPPORT OF PETITIONER[1]

STATEMENT OF INTEREST

Teresa Earnhardt is a private citizen who files this *Amicus* Brief in support of Petitioner Office of Independent Counsel and the Intervenors who are members of the Vincent Foster family. Mrs. Earnhardt's husband, Dale Earnhardt, was a well-known racecar driver who was tragically killed in February 2001 during the Daytona 500, a major NASCAR race at Daytona International Speedway in Daytona Beach, Florida. An autopsy was performed on Dale Earnhardt, as required by Florida law, resulting in a very detailed autopsy report and thirty-three autopsy photographs. The autopsy report was released to the public. A written evaluation of the autopsy by an independent court-appointed expert was also released to the public. As a result of over two years of litigation and legislation adopted by the Florida Legislature, the autopsy photographs of Mr. Earnhardt have *not* been released to the public.

In the two years since Dale Earnhardt's death, Teresa Earnhardt has become a national spokeswoman for families like hers: families who lose a loved one through a tragedy that triggers the involvement of some governmental agency (whether a medical examiner, sheriff, police department or other law enforcement agency), and then find themselves faced with the task of protecting themselves and their families from the unimaginable pain caused by the public release (including public inspection, public copying, and public republication) of post-mortem photographs of their loved one's dead body taken and collected by that government agency in the performance of its public duty. Mrs. Earnhardt's particular focus has been

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than Teresa Earnhardt made a monetary contribution to the preparation and submission of this brief.

on the inspection, copying and republication, by print and electronic press and on the internet, of autopsy photographs created by reason of state laws requiring an autopsy to be performed by a governmental medical examiner to determine cause of death in any unexpected or initially unexplained death.

Mrs. Earnhardt's interest in this case is two-fold. First, although her struggle to prevent the public release of her husband's autopsy photographs arose under state law rather than the Freedom of Information Act (the "FOIA"), she believes that the circumstances of her case bear directly on the principal issue in this case, which is whether the public inspection, copying and publication[2] of post-mortem photographs (whether death scene or autopsy) "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) or "Exemption 7(C)." The State of Florida (widely recognized as the national leader in both ensuring that public records are truly public and in ensuring personal privacy) adopted legislation providing for the balancing of these rights in any public release of autopsy records. By adopting Ch. 2001-1, Laws of Florida (the "Act" codified at Fla. Stat. § 406.135), the State of Florida now requires that the *autopsy report* remain a public record for public inspection and copying, but then also, relying upon legislative findings as to the devastating impact on the survivors resulting from public inspection and copying of the *autopsy photographs* of their decedent, prohibits the inspection and copying of such photographs absent a showing of good cause based upon a four-factor balancing test.[3] The issues involved in balancing these

[2] The Florida statute governing access to public records provides for a request to "inspect and copy" the purported public record. *See* Fla. Stat. § 119.07. The FOIA does likewise ("Each agency, in accordance with published rules, shall make available for public inspection and copying . . . " 5 U.S.C. § 552(a)(2)).

[3] The Act had widespread by-partisan support, and passed by far more than even the 2/3 vote that is now required by virtue of the

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rights are similar to those involving Exemption 7(C). Further, she believes the experience of the various states in the adoption of laws similar to that passed by Florida's Legislature in 2001, would be of interest to this Court, since death scene and autopsy photographs are far more often created by local and state agencies than by federal agencies. The significance of the state statutes and cases discussed herein is that they provide logical and actual support for the proposition that there can be a balance between the privacy interest and the public's right to know. In fact, the circumstances in Florida provide a laboratory in a state that has elevated both the public right to know and the individual privacy right to textual constitutional status.[4]

Teresa Earnhardt's second interest in this case is personal. Mrs. Earnhardt's case arose in today's modern age of high-speed technology and insatiable voyeurism, an age where we have witnessed the evolution of the traditional print/television press to an electronic/internet press with a "no-holds-barred," "worse is better," and "if it bleeds, it leads" mentality. Today, entire internet sites are devoted to the exploitation of death scene photographs, autopsy photographs, crime scenes, and anything else available. Nothing is private, and nothing is sacred. Indeed, unfortunately, Dale Earnhardt's death has become the cataclysmic event through which the public, and the Florida Legislature, came to recognize the need for protection of *all* families from exploitation by the unconstrained

amendment to Article I, Section 24, Fla. Const. approved by the electorate on November 5, 2002. This amendment was proposed by the Florida Legislature, reflecting that body's continuing commitment to "government in the sunshine."

[4] Florida citizens have given both rights constitutional status, endorsing both the protection of personal privacy (Art. I, § 23, Fla. Const.) and the continued accessibility of public records (Art. I, § 24, Fla. Const.).

public dissemination of their loved one's autopsy photographs. Few courts have had the opportunity to examine this issue as have Florida courts as a result of the struggle over Dale Earnhardt's autopsy photographs. Teresa Earnhardt believes that the detailed evidentiary findings of these Florida courts – and the Florida Legislature – confirm at the state level the analogous analysis made by the D.C. Circuit in *Accuracy In Media, Inc. v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000). As the *Earnhardt* trial court determined:

> This case involves a collision of cataclysmic proportion between two extremely valuable rights and their zealous proponents. Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. We live in a world in which the individual can anticipate that everything from one's market habits to one's personal health (and everything in-between) are known to anyone with the electronic capacity to eavesdrop. The curiosity of the public combined with the need of the commercial marketers and the media to feed a stated [sic] population with an increasingly sensational daily product have led to a substantially unhealthy environment. Nosiness has become the order of the day – so long as it is amusing or entertaining. Our society has tacitly accepted a standard that permits invasion of privacy of gross dimension, and we have become forgetful of some very basic concepts. Foremost among them is the simple notion that many things are nobody else's business. We are entitled to be let alone; to have our private space – a space that is not subject to invasion by the uninvited.

Earnhardt v. Volusia County, 2001 WL 992068, *5 (Fla. Cir. Ct., July 10, 2001) (No. 2001-20773-CICI).

After examining the evidence, the *Earnhardt* trial court determined that "release of the autopsy photographs to any members of the public could result in immediate,

widespread dissemination of these disturbing images, including posting on the world wide web." *Id.* at *3. The court also took judicial notice of the many web sites already specializing in the publication of photographs that are "without question gruesome, grisly, and highly disturbing to a person of ordinary and normal sensibilities." *Id.* at *2.

> There are numerous web sites, which specialize in posting gruesome, grisly and disturbing images of dead or severely injured persons, as well as autopsy photographs. Some of these websites are findadeath.com, choosedeath.com, and websitecity.com. It is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available.

Id. at *3.[5]

Teresa Earnhardt was not the first person to find herself in this situation. Indeed, the *Earnhardt* trial court accepted testimony of relatives of two deceased racecar drivers whose autopsy photographs had already been posted on the web.[6] It became clear from the testimony of

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[5] *See, e.g.*, http://www.earnhardtinvestigation.com; http://www.// death gallery. com; http://www.lisamcpherson.org. lisapics.htm; http://www.bobaugust.com/photos.htm (crime scene photographs of Simpson and Goldman murders); http://www.findadeath.com (*see e.g.*, Jeffrey Dahmer page); and http://www.everwonder.com/david/worldofdeath.

[6] The trial court also heard testimony from the relatives of Neil Bonnett and Rodney Orr, the deceased racecar drivers whose autopsy photographs were posted by Intervenor Uribe on his website. Ms. Kristen Bonnett testified about the extreme emotional distress she felt when she viewed Uribe's website and saw 48 autopsy photographs of her father "on the table, butt [sic] naked, gutted like a deer . . . staring me directly in the face." *See Earnhardt v. Volusia County*, trial testimony of Kristen Bonnett. Mr. Beacher Orr, who did not view his son's autopsy photographs, testified about how he "went all to pieces" upon learning that they were published on Uribe's website. *Id.*, trial testimony of Beacher Orr. The thought of people viewing pictures of Rodney

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the victims' families that merely prohibiting *copying* of their loved one's autopsy photographs did not prevent this "unwarranted intrusion" upon their privacy. So long as public *inspection* is permitted in any form, there is unwarranted intrusion upon privacy, with its resulting pain; indeed, it matters only in degree whether the inspection occurs one-by-one at the medical examiner's office, or by millions of people viewing the photographs on the internet. It is the *disclosure* of these highly private and personal photographs in any way (whether by inspection only or by copying), and the *knowledge* of that disclosure, that result in the unwarranted intrusion. Based on this testimony, the *Earndhardt* trial court found:

> The intervener, Mr. Uribe, has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, websitecity.com. Relatives of those decedents testified in the present proceeding. The court recognizes that not only the publication of their loved ones' autopsy photographs on the internet, but also the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal distress and trauma to them and their families. It was clear from their testimony, and the testimony of Teresa Earnhardt, that it is the unnecessary inspection itself – not necessarily the frequency with which it occurs – that constitutes the gravamen of the injury to a family. The witnesses in this case were obviously shocked by the use of the World Wide Web, but they also felt significantly invaded by unnecessary inspection on a more limited scale. The character of this particular injury is such that unwarranted invasions of the

"laying on the table there, naked and bleeding," has caused him insomnia. *Id.*

> family's privacy, regardless of the frequency, leave a scar.

Id. at *3. The *Earnhardt* trial court further determined that:

> The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse. The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone would cause continuous pain and anxiety to the family and prolong their suffering. The court specifically finds that examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members.

Id.

Teresa Earnhardt's interest here is in making sure that no "other family in America go[es] through what we're going through." *See* Statement of Teresa Earnhardt, March 4, 2001, http://www.orlandosentinel.com/sports/motorracing/orl-spt-teresastatement0304,0,1008732.story. Even though Dale Earnhardt's autopsy photographs have been sealed by a court, Teresa Earnhardt recognized:

> [T]here's a larger issue here. As our family has learned, the laws differ from state-to-state concerning accessibility to autopsy photos. The deceased have a right to their dignity and loved ones have a right to be free from exploitation. . . . Our family knows that what is happening to us is wrong and we don't want any other family in

> America to go through what we're going through . . . This is the first time I've spoken in public since we've lost Dale. Honestly, I'm not very comfortable being here. It's too soon. But this issue is of vital importance – not just to my family – but to anyone ever faced with being exploited after losing a loved one.

Id.

The many parallels between the *Earnhardt* case, at the state level, and this case, at the federal level, may well be of use to this Court as it weighs the public's right to records of governmental agencies against the family's privacy interest in avoiding disclosure of highly personal post-mortem photographs collected by governmental agencies in the performance of their duties.

SUMMARY OF THE ARGUMENT

Both the FOIA and most state laws balance specific public interests in the disclosure of information against intrusions into personal privacy. The courts have placed a substantial burden on parties seeking disclosure of personal materials to show strong public necessity for the disclosure. At the same time, courts recognize that one's private interest in keeping matters private is increased when dealing with photographs, particularly post-mortem photographs. To analogize the holding in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989), the privacy interest in protecting personal post-mortem photographs is at the apex of privacy interests, while public interest in disclosure of such photographs is at its nadir. Consequently, in any balancing of these interests, the "disparity on the scales of justice" supports a categorical exemption, absent compelling circumstances. This Court in *Reporters Comm.* balanced competing interests and applied that balance to an entire category of records – rap sheets. Post-mortem photographs warrant the same categorical analysis. Logically, families of decedents subject to disclosure of post-mortem photographs should have equal or greater

protection than criminals as to disclosure of their rap sheets.

ARGUMENT

I. Requiring A Public Interest Nexus For The Release Of Post-Mortem Photographs Under The FOIA Is Consistent With The Good Cause Requirement Imposed By Florida And Other States On The Release Of Autopsy Photographs.

This Court has recognized that the policies adopted by states with respect to the interrelationship between the privacy interests of subject individuals and the societal interest in the public availability of documents collected or created by the government are relevant to determinations made under the FOIA:

> State policies, of course, do not determine the meaning of a federal statute, but they provide evidence that the law enforcement profession generally assumes – as has the Department of Justice – that individual subjects have a significant privacy interest in their criminal histories. It is reasonable to presume that Congress legislated with an understanding of this professional point of view.

Reporters Comm., 489 U.S. at 767. To be sure, the state policy to which the Earnhardt family has directed attention deals with whether, and to what extent, autopsy photographs, created by government for a defined regulatory purpose (medical examiner determination of cause of death), should be exposed to public view and republication by reason of Florida's counterpart to the FOIA. The other states that have adopted statutes similar to that of Florida have also generally been directed at autopsy photographs. Although the photographs here involved may not technically be autopsy photographs, but rather death scene photographs, they are also created by government for a defined regulatory purpose (law enforcement investigation as to cause and circumstances of death). Further, we

believe the tension between the interest of the private subject – the members of the family of an individual killed in a violent tragic death – in preventing public view or replication of photographs of the deceased person so as to maintain their private memories of that individual against the potential assaults on their sensibilities by an increasingly intrusive and invasive press – is similar to that involved in the weighing of interests considered in determining whether disclosure of a governmental document under Exemption 7(C) is appropriate. Autopsy photographs are, as the Florida Legislature found, more grotesque than most death scene photographs, in that they involve a pictorial representation of the physical dismembering of the decedent. However, an unwarranted invasion of personal privacy may occur in either instance, the autopsy photograph or the death scene photograph.

So also, the nature of the governmental interest in disclosure, highlighted in the Florida and other states' statutes, may be relevant to that articulated in case law interpretations of the FOIA. Like the public records laws of most states, the FOIA was "designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976). As this Court has observed:

> Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested documents and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. at 372, rather than on a particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

Reporters Comm., 489 U.S. at 772.

> FN20. Cf . . . Kronman, The Privacy Exemption to the Freedom of Information Act, 9 J. Legal Studies 727, 733 (1980) ("The act's first and most obvious goal (reflected in its basic disclosure requirements) is to promote honesty and reduce waste in government by exposing official conduct to public scrutiny"); . . .

Id. at fn. 20.

> This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,' *Department of Air Force v. Rose,* 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about 'what their government is up to.'" . . . That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct . . . Indeed, response to this request would not shed light on the conduct of any Government agency or official.

Id. at 773.

The purpose of the FOIA, like the purpose of state public records laws, is to foster governmental openness and accountability, not to disclose information about private citizens. Thus, release of information about private citizens under the FOIA is properly conditioned upon an assessment that the release of such information serves the public interest in evaluating governmental performance:

> Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as

> no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

Reporters Comm., 489 U.S. at 774-75.

Assessment of the public interest in the disclosure of the post-mortem photographs at issue here is guided by three established principles: First, there is a "nexus" requirement – i.e., the public interest must be assessed in relationship to the requested photographs. *See Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987). Second, the public interest in disclosure must be viewed in light of the information that has already been disclosed to the public. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (denying disclosure where public interest has been adequately served by disclosure of the redacted interview summaries). Third, there must be evidence of government wrongdoing or misconduct. *See Schiffer v. F.B.I.*, 78 F.3d 1405, 1410 (9th Cir. 1996); *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991); *Neely v. F.B.I.*, 208 F.3d 461, 464 (4th Cir. 2000).

Similar to the judicial pronouncements of this Court and other federal courts, the Florida Legislature has provided for disclosure of autopsy photographs on a showing of "good cause" for their production, with that "good cause" to be predicated on 1) whether disclosure is necessary so that the public can evaluate the government's performance; 2) the seriousness of the intrusion into the family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records regardless of form. Fla. Stat., § 406.135(2)(a) (2001).[7]

[7] Article I, Section 24(c), Fla. Const. permits the Legislature to create exemptions to Florida's Public Records Law if two conditions are met: the law states with specificity the public necessity justifying the

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The first of these predicates is virtually identical to the pronouncements of this Court as to the FOIA (that is, whether disclosure is necessary for the evaluation of the government's performance), and is always the critical prerequisite. Thus, in *Accuracy in Media*, the D.C. Circuit properly held that AIM had to show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence." 194 F.3d at 124, quoting *SafeCard*, 926 F.2d at 1205-06. Similarly, at the state level, in the *Earnhardt* case, the trial court noted that significant information had already been made publicly available about Mr. Earnhardt's death, including a very detailed autopsy report and the report of an independent court-appointed expert. The press raised no question as to the competency of the medical examiner or his report. Indeed, the press' only asserted reason for wanting the photographs was to evaluate the safety of NASCAR racing. The press failed to suggest any reason that copying the autopsy photographs would be helpful "in any degree whatsoever" in evaluating the performance or accountability of government. *Earnhardt v. Volusia County*, 2001 WL 992068 at *3. The trial court further found that there were no allegations of government impropriety. Specifically, there were no allegations that the medical examiner did not perform a proper autopsy, and no challenge to his conclusion that Dale Earnhardt died as a result of a skull fracture.

The trial court further determined that the press' arguments relating to NASCAR racing safety, while potentially raising a number of *private* interests, did *not* implicate a governmental interest. *Id.* In fact, according to the trial court, these arguments "were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a

exemption, and the exemption is no broader than necessary to accomplish the stated purpose of the law.

profit at the expense of [the Earnhardt] family. They are strained arguments and are entirely too tenuous for realistic discussion." *Id.* The *Earnhardt* trial court found that in the absence of some question raised as to the performance by the medical examiner of his public duties or some other evaluation of governmental performance, the privacy interest of the Earnhardt family in the autopsy photographs remaining out of public view was controlling.

In affirming the *Earnhardt* trial court, the Fifth District Court of Appeal of Florida found the absence of any issue regarding governmental performance and the failure to show how release of the autopsy photographs would promote the public interest was thus fatal:

> As to the first factor, while the public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion, that interest cannot be served by viewing the autopsy photographs of Mr. Earnhardt because the uncontradicted testimony establishes that the photographs are not of diagnostic quality. Moreover, the testimony further established that there is nothing that can be discerned from the photographs that is not contained in the autopsy report and other materials that have been released to Campus and the public. If it cannot be determined from the photographs that the cause of death was anything other than what the medical examiner concluded, the photographs will not aid in assuring that the government is performing up to the required standard. Regarding the argument advanced by Campus that the photographs are needed to evaluate NASCAR safety requirements, the trial court found, and we agree, that the safety requirements of NASCAR, a private entity, do not implicate the public interest in evaluating governmental performance sufficient to release the photographs.

Campus Communications, Inc. v. Earnhardt, 821 So.2d 388, 402 (Fla. 5th DCA 2002), *rev. denied*, (Fla. July 1, 2003) (Table, Case No. SC02-1635).

II. Privacy Under The FOIA: The Public Release Of Post-Mortem Photographs Invades The Privacy Rights Of The Surviving Family, Is Inconsistent With Legislation Adopted By Florida And Others States, And Warrants A Categorical Exemption From The FOIA Disclosure.

Increasingly, legislatures and courts (both state and federal) have been forced to deal with issues involving the public disclosure of private information about private citizens collected by governmental agencies in the performance of their duties.[8] Informational privacy has become increasingly important in light of the increased availability of information about an individual that in simpler times would have been considered highly personal. Exacerbating the amount of information available about any given person is the increased accessibility to computers capable of collecting and collating such information into massive databases. Although it would perhaps be better to restrict the information that is collected about an individual, as a practical matter to date, this has proved impossible. Further, as in the case of autopsy photographs, there is often a very legitimate reason to collect, that is

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[8] Even courts are increasingly concerned about the amount of sensitive information about individuals filed with courts and then widely publicly disseminated. *See* the Florida Supreme Court Workgroup on Public Records, *Privacy and Electronic Access To Court Records, Report and Recommendations*, at http://www.flcourts.org/sct/clerk/briefs/2002/601-800/02-659_petition.pdf, at 27-31 (Nov. 15, 2001); *see also*, Judicial Conference of the United States, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files*, at http://www.privacy.uscourts.gov/policy/htm.

"create" the information. For both these reasons, there will be an increasing effort to restrict the dissemination of information already collected by governmental agencies.[9]

While the *Earnhardt* case is not a FOIA case, the federal FOIA and its exceptions are the federal analogues to Florida's Public Records Act (Fla. Stat. § 119) and the Family Protection Act. Both the FOIA exceptions and the Florida statute are designed to protect the privacy rights of both decedents and their families.

In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court acknowledged an individual's constitutionally protected right to information privacy, or the "individual's [privacy] interest in avoiding disclosure of personal matters." *Id.* at 599. As this Court observed:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.

Id. at 605. Although rejecting the privacy arguments made by patients and doctors about the New York statute requiring entry of patient names, addresses and doctors in a centralized computerized database, the Court did so on

[9] Congress has been increasingly sensitive to and protective of this need to keep private information about private citizens from public disclosure. *See, i.e.*, Consumer Privacy Section Act of 2003, H.R. 1636 108th Cong. (2003); Privacy Act of 2003, S. 745, 108th Cong. (2003); the Telemarketing Intrusive Practices Act of 2001, S. 1881, 107th Cong. (2001); Privacy Commission Act, H.R. 583, 107th Cong. (2001); the Confidential Information Privacy Act, H.R. 2136, 107th Cong. (2001); and the Student Privacy Protection Act, S. 290, 107th Cong. (2001).

two grounds: (a) that the state had taken security precautions to ensure the database information would not be unintentionally disclosed or made publicly available; and (b) the state had shown an important interest in tracking the use of certain legal, yet dangerous, drugs. *Id.* at 600-02.

This notion of constitutionally protected informational privacy has been adopted in the areas of statutory and regulatory protection of private information collected by governmental agencies in the performance of its duties, creating a statutory privacy interest under FOIA. Since 1976, this Court has considered several cases involving the FOIA demands for records containing information about private individuals.[10]

In the first such case, the Court established a balancing test for deciding challenges to requests for government records by weighing the democratic value of access to the information against the individual value of privacy. *Dep't of Air Force*, 425 U.S. at 352. This Court held that when a privacy challenge seeks to block disclosure under the FOIA, the balancing test between the individual value of personal privacy against the societal value of public disclosure should be the device to determine whether a record should be released. Applying this balancing test, the Court upheld a FOIA request by law review editors for summaries of honor and ethics violations at the U.S. Air Force Academy, holding that although the records would

[10] Exemption 6 prohibits disclosure of records pertaining to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Exemption 7 privacy section states that the FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) is more protective of privacy than Exemption 6. *See U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496, n.6 (1994).

be disclosed, the names of the cadets would be redacted first.

Over the next two decades, this Court has heard several other FOIA privacy cases involving the FOIA Exemptions 6 and/or 7, and in all such cases has upheld the agency's decision to withhold records on a privacy basis. It is significant that in no case construing the FOIA has this Court found it appropriate to order a governmental agency to honor a FOIA request for information about a particular private citizen. *See Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (rejecting on privacy grounds an environmental group's FOIA request for contact information of individuals who received a Bureau of Land Management newsletter about the future of the Oregon High Desert); *U.S. Dep't of Defense*, 510 U.S. 487 (rejecting as a clearly unwarranted invasion of personal privacy a FOIA request by unions for home addresses of federal employees for the purpose of contacting them about union membership); *U.S. Dep't of State v. Ray*, 502 U.S. at 178 (holding that disclosure to an attorney of unredacted address information to assist Haitian immigrants who unsuccessfully sought political asylum in the United States was not warranted under the FOIA because the "public interest has been adequately served by disclosure of the redacted interview summaries and that disclosure of the unredacted documents would therefore constitute a clearly unwarranted invasion of the interviewees' privacy."); *Reporters Comm.*, 489 U.S. 749 (rejecting a journalist's FOIA request for an FBI rap sheet of a reputed crime figure suspected of bribing a congressman to obtain a federal contract on grounds that releasing the information would be an invasion of privacy because the rap sheet would not shed any light on official agency operations or activities); *C.I.A. v. Sims*, 471 U.S. 159 (1985); *F.B.I. v. Abramson*, 456 U.S. 615 (1982) (rejecting a journalist's FOIA request for FBI report requested by President Nixon, who ordered FBI background checks on his political enemies, on grounds that information originally compiled for law enforcement purposes does not lose its privacy exemption status merely because the information is reproduced in a new document that is not for law enforcement purposes); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982) (rejecting a FOIA request by the Washington Post for passport application information on two Iranian nationals who traveled under the protection of United States passports during a period of strained relations between Iran and the United States).

Federal courts have consistently held that the protection afforded to medical data also encompassed post-mortem photographs and other highly personal records.[11] For example, in *New York Times Co. v. National Aeronautics and Space Administration*, 782 F.Supp. 628, 631-32 (D.D.C. 1991), the court held that the privacy rights of the family members of the Challenger astronauts outweighed public interest in hearing audio tapes of the crew's last words, and thus prohibited release of these tapes under the FOIA. Four years later the D.C. Circuit blocked the disclosure of autopsy photographs and held that their disclosure implicates the privacy rights of both the decedent and his family. *Katz v. National Archives and Records Administration*, 68 F.3d 1438 (D.C. Cir. 1995) (holding the autopsy photographs of former President John F. Kennedy could not be released to the public because they had been given to the Kennedy estate, and were thus not government records subject to disclosure, but also noting that even if the photographs were government records, they would remain exempt from disclosure under a FOIA exception for medical records. "The x-rays and [autopsy] photographs are

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[11] In applying Exemption 7(C) to post-mortem photographs, a court must weigh the privacy interest of the deceased's family in keeping the photographs closed to public viewing "against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Defense*, 510 U.S. at 497, citing *Reporters Comm.*, 489 U.S. at 773 (internal quotation marks omitted; emphasis deleted).

medical records," the court held, "which are usually considered private. *See, e.g.*, 5 U.S.C. § 552(b)(6) (exempting 'medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' from disclosure under the FOIA.") *Id.* at 1441); *see also*, *Badhwar v. U.S. Dep't of Air Force*, 829 F.2d 182, 185-86 (D.C. Cir. 1987) (concluding under the FOIA standard that release of autopsy photographs of deceased pilots would "shock the sensibilities of surviving kin" and was a "clearly unwarranted invasion of personal privacy" of the families); *Stone v. F.B.I.*, 727 F.Supp. 662 (D.D.C. 1990), *aff'd*, 1990 WL 134431 (D.C. Cir. 1990) (withholding of the names of FBI and local law enforcement agents that participated in the investigation of the assassination of Senator Robert F. Kennedy); *see also*, *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993) (holding that Exemption 7(C) prevented the disclosure of photographs of a deceased victim as no public interest could be discerned that would outweigh the personal privacy interest of a victim's family).

The importance of this privacy interest has expanded to the point that at least one federal circuit has held that one's individual privacy interest may override even a state's open records law. Thus, the Sixth Circuit relying upon *Whalen*, recently held that the individual right to nondisclosure of private information means that private information in governmental records may be withheld despite the fact that the record is otherwise disclosable under a state open records law. *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).[12]

[12] Other circuits have likewise recognized this informational privacy interest. *See, i.e., Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Doe v. Attorney General of the U.S.*, 941 F.2d 780 (9th Cir. 1991); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980); *Schachter*

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Use of this federal balancing test can be found in Florida and other state courts as well. Indeed, state courts and legislatures regularly recognize the value of public disclosure by weighing the right of public access against the individual's right to privacy. Although access to public records has enjoyed a long history in Florida and has been recognized as highly significant, *see Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984), until adoption of Article I, Section 24 in 1992, any rights to records were solely based on statutory law.[13] The Legislature proposed, and the people of Florida adopted, Article I, Section 24 to secure and define the right of access to public records. The same provision also includes the appropriate standard of review for any new exemptions: that these be explicitly based on a finding of public necessity and that they be no broader than necessary. Florida has thus led the nation in open government – that is, government in the sunshine.

Florida has also led the nation in recognizing privacy rights, and the potential tension between privacy interests and government in the sunshine. Florida's privacy amendment was adopted in 1980.[14] Instead of requiring a showing of a compelling state interest to overcome the privacy right, Florida courts use a balancing test because the language in Section 23 provides that "[t]his section shall not be construed to limit the public's right of access

v. Whalen, 581 F.2d 35 (2d Cir. 1978); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

[13] This amendment was prompted by a decision by the Florida Supreme Court that found the Florida public records law did not apply to many executive, legislative, or judicial officers. *See Locke v. Hawkes*, 1991 WL 231589 (Fla. 1991). The controversial decision was later withdrawn.

[14] Florida's explicit constitutional right to privacy is broader, and provides more substantial protection than does the comparable federal right. *See In re T.W.*, 551 So.2d 1186, 1198 (Fla. 1989); *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 548 (Fla. 1985); *North Fla. Women's Health and Counseling Servs., Inc. v. State of Florida*, 2003 WL 21546546 (Fla. July 10, 2003).

to public records and meetings as provided by law." Art. I, § 23, Fla. Const.

Faced with these two competing constitutional interests, the Florida Legislature became one of the first state legislatures to adopt legislation granting a limited, categorical exemption from the state's public records laws for autopsy photographs.[15] In doing so, the Legislature cited comprehensive legislative findings as to the purpose for the limited exemption it was creating:

> The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(a), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio records of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio records may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.

2001 Fla. Laws, ch. 2001-1, § 2.[16]

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[15] As a practical matter, there is little alternative. Once autopsy photographs are released, an after-the-fact tort damages award (even if it exists) is worth nothing, and does not compensate for the unwarranted invasion of personal privacy.

[16] Such legislative findings, set forth in Section 2 of Chapter 2001-1, are presumptively correct and are entitled to great deference under Florida law. *See Univ. of Miami v. Echarte*, 618 So.2d 189, 196 (Fla. 1993).

The Florida Legislature specifically expressed its concern about the worldwide web and the potential for widespread dissemination of autopsy photographs:

> The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Id.

The Act exempts from immediate public records disclosure the photographs, videotapes and recordings of an autopsy, but permits such disclosure if a court finds good cause. The right to immediate disclosure remains with a surviving spouse and certain delineated family members, and governmental agencies in furtherance of their official duties. Fla. Stat. § 406.135(1).

While Florida has led the nation in enacting this legislation, it is certainly not the only state to have recognized the need for specific laws restricting access to autopsy photographs that would otherwise be available under state public records laws. Most states now restrict public access to autopsy photographs. In fact, in the last several years, the trend seems to be to follow the reasoning of the FOIA and the new Florida statute, by balancing intrusion upon privacy against the public interest in disclosure. Twenty-four states (Alaska, California, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa,

Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Washington and West Virginia) currently have adopted specific laws making autopsy photographs or autopsy reports confidential.[17] Nineteen states (Arizona, Arkansas, Colorado, Hawaii, Illinois, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia and Wisconsin) have limited access to autopsy records either by statute or case law.[18] Only seven states have no restrictions on public

[17] *See* Alaska Stat. § 12.65.020 (2003); Cal. Civ. Proc. Code § 129 (2003); Conn. Gen. Stat. § 19a-411(b) (2003); Del. Code Ann. tit. 29, § 10002(d)(15) (2002); Fla. Stat. § 406.135 (2002); Ga. Code Ann. § 45-16-27(d) (2002); Ind. Code Ann. § 36-2-14-10 (2003); Iowa Code § 22.7(41) (2003); 2001 La. Acts 117, effective August 15, 2001, created La. Rev. Stat. § 44 (2001); Me. Rev. Stat. Ann. tit. 22, § 3002(8) (2003); Md. Regs. Code tit. 10.35.01.14(A) (2003); Mass. Gen. Laws Ann. ch. 38, § 2 ¶ 8 (2003); Minn. Stat. § 13.83 (2002); N.H. Rev. Stat. Ann. § 611-A:8(IV) (2002); N.J. Stat. Ann. § 47:1A-1.1 (2003); *Shuttleworth v. City of Camden*, 610 A.2d 903, 914-15 (N.J. Super. Ct. App. Div. 1992); N.Y. County Law § 677(3)(b) (McKinney 2003); 2003 N.D. Laws ch. 384; Okla. Stat. tit. 51, § 24A.5(1)(d) (2002); R.I. Gen. Laws § 23-3-1(11) (2002); R.I. Gen. Laws § 23-3-23(a) (2002); R.I. Code R. 814.1 and 814.2 (2002); S.C. Code Ann. § 17-5-535(A) (2002); Tex. Gov't Code § 552.101 (2003); Tex. Code Crim. Proc. Ann. art. 49.25(11) (2003); Utah Code Ann. § 26-4-17(4) (2003); Wash. Rev. Code § 68.50.105 (2003); W. Va. Code § 61-12-10 (2003). (*See* attached Appendix for a description of these various state laws).

[18] *See* 1988 Op. Atty Gen. 174 (Ariz., Dec. 30, 1988); Ark. Code Ann. § 14-15-304(a) (2003); Ark. Code Ann. § 12-12-312(a)(1) (2003); Ark. Code Ann. § 25-19-105(b)(6) (2003); 2001 Op. Atty Gen. 2001-100 (Ark., May 9, 2001); 1997 Op. Atty Gen. 97-294 (Ark., Sept. 25, 1997); Colo. Rev. Stat. § 24-72-201 (2002); Colo. Rev. Stat. § 24-72-204(6)(a) (2002); *Bodelson v. Denver Post Corp.*, 5 P.3d 373, 378-79 (Colo. Ct. App. 2000); *Disclosure of Autopsy Reports*, OIP Op. Ltr. 91-32 (Haw., Dec. 31, 1991); 5 Ill. Comp. Stat. Ann. 140/7(1)(b) (2002); 5 Ill. Comp. Stat. Ann. 140/7(1)(c) (2002); *Mager v. Dep't of State Police*, 595 N.W.2d 142, 146 (Mich. 1999); Mich. Comp. Laws § 15.243(1)(b) (2003); Miss. Code Ann. § 41-61-65(1) (2003); Mo. Ann. Stat. § 610.100.2 (2002); *News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 579-80 (Mo. App. 1998); Mont.

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access to autopsy records and photographs (Alabama, Idaho, Kansas, Kentucky, New Mexico, North Carolina and Wyoming); however, legislation to exempt the disclosure of autopsy photographs has been initiated in two of these states (Kentucky and North Carolina).[19]

Florida's categorical exemption from its open records law for autopsy photographs (absent a showing of good cause) is based on well-established Florida constitutional law providing extraordinary and specific protection for situations such as these, where potential public release of sensitive information would cause severe and unwarranted interference with the informational right of privacy arising under Article I, Section 23, Fla. Const. and the Fourteenth Amendment to the U.S. Constitution. *Post-Newsweek Stations, Florida, Inc. v. Does*, 612 So.2d 549

Code Ann. § 1-6-102(3) (2002); *Lincoln County Comm'n v. Nixon*, 968 P.2d 1141 (Mont. 1998); *State v. Nelson*, 941 P.2d 441, 446-47 (Mont. 1997); Neb. Rev. Stat. § 84-712.05(5) (2002); 1982 Op. Atty Gen. 82-12 (Nev., June 15, 1982); *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 465 N.E.2d 458, 459-60 (Ohio 1984); Or. Rev. Stat. § 146.035(5) (2001); *Com. ex rel. Dist. Attorney of Blair County*, 823 A.2d 147 (Pa. Super. Ct. 2003); S.D. Codified Laws § 1-27-1 (2003); S.D. Codified Laws § 23-14-12 (2003); S.D. Codified Laws §§ 23-6-14 and 23-6-17 (2003); Tenn. Code Ann. § 38-7-110(c) (2003); Tenn. Code Ann. § 38.7-110(d) (2003); Vt. Stat. Ann. tit. 1, § 317(c)(2) or (c)(7) (2003); Vt. Stat. Ann. tit. 18, § 5205(f) (2003); Va. Code Ann. §§ 2.2-3705 and 2.2-3706.G.1 (2003); Wis. Stat. § 19.35(1)(a) (2002); *Journal/Sentinel, Inc. v. Aagerup*, 429 N.W.2d 772, 774-75 (Wis. Ct. App. 1988). (*See* attached Appendix for a description of these various state laws).

[19] *See* Ala. Code § 36-18-2 (2002); Idaho Code § 9-335(1) (2002); Idaho Code § 9-340(4) (2002); Kan. Stat. Ann. § 22a-233(c) (2002); Kan. Stat. Ann. § 45-216(a) (2002); Ky. Rev. Stat. Ann. § 61.872(1) (2002); Ky. Rev. Stat. Ann. § 61.870(1) and (2) (2002); Ky. Rev. Stat. Ann. § 61.878(1)(h) (2002); Ky. Rev. Stat. Ann. § 61.878(1)(a) (2002); Opinion Atty. Gen. 92-94 (Ky., Feb. 19, 1992); 88-2 (Ky. 1988); N.M. Stat. Ann. § 14-2-1.A (2002); N.C. Gen. Stat. § 130A-389(a) (2002); Wyo. Stat. Ann. § 16-4-203(d)(i) (2003). (*See* attached Appendix for a description of these various state laws).

(Fla. 1992) ("*Does*"); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988).[20]

The four-part test adopted by the Florida Legislature is based on the test first used in *State of Florida v. Rolling*, 1994 WL 722891 (Fla. 8th Cir. Ct., No. 91-3832-CF-A, July 27, 1994), which involved the trial of a serial murderer of students at the University of Florida, and at which trial the autopsy and death scene photographs of the deceased students were to be introduced. The public interest in governmental accountability and justice weighed very heavily in favor of permitting full courtroom accessibility to the press in this highly publicized criminal murder trial. However, in a somewhat kinder, gentler day, the trial judge, the parties, and the media agreed to a four-part test for inspecting, but not copying, the trial photographs, so as to protect both whatever disclosure might be necessary for the public evaluation of governmental performance while protecting the seriousness of the intrusion into the right of privacy of the families of the murdered victims.[21] The issue

[20] The Florida Supreme Court's decision in *Does*, specifically acknowledged this right to informational privacy. The records involved included the names and addresses of John Does (the "johns") plus "sexual notations regarding . . . customers" and "intimate information relating to genital size and sexual performance." *Id.* at 549. The court held that it must "qualify the public's statutory right of access . . . by balancing it against the Does' constitutional right to privacy", and specifically applied the balancing standards set forth in *Barron*. *Id.* at 551-52. The court *rejected* the media's argument that there should be no such balancing. The court noted the various private types of information subject to non-disclosure and, while concluding names and addresses of persons participating in the crime of prostitution were disclosable, it nonetheless made clear that the intimate sexual information was both *not* at issue and was different ("we note that the details of an individual's life dealing with noncriminal intimate associations fall within a protected zone of privacy" (*id.* at 552, n.3)). In *Barron* and *Does*, the Florida Supreme Court stated that the constitutional privacy rights of innocent third parties were appropriate grounds for restricting access to records otherwise public.

[21] The court recognized that post-mortem photographs of murder victims at the scene of the crime and during their autopsy were

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was next posed in *Versace v. Office of the State Attorney, Eleventh Judicial Circuit (Dade County)*, No. 97-29417 (Fla. 11th Cir. Ct., 1998), where the court, at the request of the family of murdered Gianni Versace, prohibited inspection and copying of Mr. Versace's autopsy photographs after the widely celebrated manhunt for his murderer, Andrew Cunanen, was concluded by Cunanen's suicide.

With this well-established legal background, three years later the *Earnhardt* trial court was able to apply the four-part test adopted by the Act in the context of Florida's privacy interest, and ruled in favor of nondisclosure. In affirming that decision, the Fifth District Court of Appeal of Florida stated:

> The second factor weighs very heavily in favour of nondisclosure. The medical examiner testified that the photographs were "gruesome, grisly and highly disturbing," and the physician attending Mr. Earnhardt after the accident confirmed this. The trial court found that such publication would "be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members." It is evident from our review of the record that the publication of the nude and dissected body of Mr. Earnhardt would cause his

"intimate and potentially embarrassing photographs of the mutilated bodies" and that "[c]ommon sense and experience dictate that no reasonable person could expect [the families] to face these images in a public forum without great emotional distress and trauma." *Rolling*, 1994 WL 722891, *4. The court noted that "[t]he content of the subject matter – the photographs of the nude bodies, the stab wounds and mutilations of the victims – can reasonably be expected to cause extreme emotional distress and trauma if encountered in supermarket tabloids, newspapers, magazines, television programs or the like . . . " *Id.* Inspection (but not copying) was permitted because there the trial court was dealing with trial exhibits, the nature of which could affect the appropriateness of imposing the death penalty.

> wife and children pain and sorrow beyond the poor power of our ability to express in words.

Campus Communications v. Earnhardt, 821 So.2d at 402. The court found there was no less intrusive means available for preventing trauma to the Earnhardt family, finding that the "mere knowledge that the photographs would be accessible for inspection was the cause of overwhelming distress to the Earnhardt family." *Id.* The trial court also found that disclosure *of any sort* would be intrusive and violate the Earnhardt family's right to privacy. Mrs. Earnhardt testified that permitting inspection of the autopsy photographs alone would be "the most painful intrusion that there could be. It would cause emotional distress not only to myself, but permanent emotional damage to my children and the rest of my family." *See Earnhardt v. Volusia County*, trial testimony of Teresa Earnhardt. Disclosure of the autopsy photographs would be "humiliating, disgusting, negative. They could be nothing but harmful and painful to anyone involved in my family, my company, our fans, anyone." *Id.*

The appellate court held as to the fourth factor:

> The fourth factor also weighs in favour of nondisclosure. As we previously stated, the autopsy report and other information was made available to the public and, given the poor quality of the photographs and the fact that they were only made as a back-up to the medical examiner's dictation system, disclosure of the photographs would reveal nothing that is not contained in the autopsy records that were released.

Campus Communications, 821 So.2d at 402.

Florida's adoption of a limited, categorical exemption for autopsy photographs may well be of interest to this Court in its consideration of the post-mortem photographs of Vincent Foster at issue here. This Court has already held that "as a categorical matter ... a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no

'official information' about a Government agency, but merely records what the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Reporter's Committee*, 489 U.S. at 780 (holding rap sheets warranted categorical exemption from the FOIA). In so holding, this Court indicated that the FOIA did not dictate a case-by-case balancing of interests, but rather "that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* at 776, citing *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Certainly, post-mortem photographs constitute a genus of records in which any FOIA balance would characteristically tip in favor of nondisclosure. Indeed, based upon the experiences[22] and precedents discussed herein, this Court would be justified in considering a categorical exemption from the FOIA for all post-mortem photographs.

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[22] Other families in recent years have also had to face the publication or possibility of publication of post-mortem photographs and video graphics of their loved ones. The family of journalist Daniel Pearl explained in a statement regarding the showing of the video of their son's murder, "it is beyond our comprehension that any mother, father or sister should have to relive this horrific tragedy ... " *See Pearl family anger at broadcast*, at http://news/bbc.co.us/1/hi/world/americas/1988828.stm. Similarly, the family of Laci Peterson expressed distress over leaks of the autopsy of their daughter and grandson. *See* Jim Wasserman, *Autopsy leak "devastates" Laci's family*, Monterey Herald, May 30, 2003, at http://www.montereyherald.com/mld/montereyherald/5971836.html. The dissemination and publication of post-mortem photographs is an unwarranted invasion of the privacy of such grieving families.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

I. STATES WITH SPECIFIC LAWS MAKING AUTOPSY PHOTOGRAPHS OR AUTOPSY REPORTS CONFIDENTIAL.

1. Alaska

ALASKA STAT. § 12.65.020 (2003) makes the reports of medical examiners "a privileged and confidential document." The statute provides that the report "may be disclosed to public officers and employees for a public purpose and, when doing so will not interfere with an ongoing investigation or prosecution, to a person who is related to the deceased or who has a financial or personal interest in the estate of the deceased person."

2. California

CAL. CIV. PROC. CODE § 129 (2003) forbids the copying of autopsy photographs, except for use in criminal proceedings or "except as a court of this state permits, by order after good cause has been shown."

3. Connecticut

CONN. GEN. STAT. § 19a-411(b) (2003) limits public access to reports of examinations by medical examiners. In *Galvin v. Freedom of Info. Comm'n*, 518 A.2d 64, 71 (Conn. 1986), the Connecticut Supreme Court upheld regulations under this statute that made autopsy reports entirely exempt from disclosure.

4. Delaware

DEL. CODE ANN. tit. 29, § 10002(d)(15) (2002) specifically exempts from public records "[a]ny photographs, video recordings or audio recordings of a postmortem examination in the possession of the office of the Chief Medical Examiner." This exemption was added by 73 Del. Laws c. 260 (effective May 17, 2002).

5. Florida

FLA. STAT. § 406.135 (2002) specifically exempts autopsy photographs, video and audio recordings from public access. This exemption was upheld by *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *rev. denied*, (Fla., July 1, 2003) (Table, Case No. SC02-1635).

6. Georgia

GA. CODE ANN. § 45-16-27(d) (2002) specifically exempts autopsy photographs from public disclosure. The statute allows continued access to law enforcement and prosecutors, for medical purposes (including medical education) and to family members. This exemption was added in 2002. 2002 Ga. Laws 667, § 1.

7. Indiana

IND. CODE ANN. § 36-2-14-10 (2003) makes photographs, video and audio recordings of autopsies confidential. The records are accessible to a surviving spouse, or if there is none to the parents or an adult child; to government agencies, provided that the identity of the deceased remains confidential unless necessary; or for coroner's

training. The section also allows a court to permit access on a showing of "good cause," for which the following standards apply: "(1) whether the disclosure is necessary for the public evaluation of governmental performance; (2) the seriousness of the intrusion into the family's right of privacy; (3) whether the disclosure of the photograph, video recording, or audio recording is by the least intrusive means available; and (4) the availability of similar information in other public records, regardless of form." This exemption was added by Indiana Public Law 271-2001, § 4 (effective July 1, 2001).

2003 Ind. HEA 1417, effective July 1, 2003, made minor amendments to IND. CODE ANN. § 36-2-14-10, allowing access for medical or pathological consultations, and requiring that identifying information be removed or masked for any release of autopsy photographs, video or audio recordings for training purposes.

8. Iowa

IOWA CODE § 22.7(41) (2003) provides that medical examiner reports, including autopsy reports, are confidential, and authorizes their release only to investigating law enforcement agencies and to the decedent's next of kin. This exemption was added by 2002 Iowa Acts ch. 1098, § 1 (approved April 9, 2002).

9. Louisiana

2001 La. Acts 117, effective August 15, 2001, created LA. REV. STAT. ANN. § 44.19, exempting autopsy photographs, video or audio records from public records. The statute authorizes release of the records only: (1) to family members

of the deceased; (2) to representatives of the estate; (3) to law enforcement for official use, or (4) if ordered by a court. The statute does not prevent the inspection of autopsy photographs or recordings.

10. Maine

ME. REV. STAT. ANN. tit. 22, § 3022(8) (2003) makes information in possession of the medical examiner confidential, including "[p]hotographs and transparencies, histological slides, videotapes and other like items relating to a medical examination case." This exemption was added by 2001 Me. Laws ch. 221, § 1. The confidential information may be released for law enforcement, medical or other official purposes, and by court order, and may be inspected and copied by family members or personal representatives. ME. REV. STAT. ANN. tit. 22, § 3022(12) & (13).

11. Maryland

Although, MD. CODE ANN., STATE GOV'T., § 10-617(b)(1) (2002) provides that autopsy reports are subject to public inspection, the Maryland Admin. Code provides that individual records other than the autopsy report, including photographs, are not public records but are considered private medical records. *See* MD. REGS. CODE 10.35.01.14(A).

12. Massachusetts

MASS. GEN. LAWS ANN. ch. 38, § 2 ¶ 8 (2003) provides autopsy reports "shall not be deemed to be public records"; authorizes the medical examiner to promulgate rules to govern limited disclosure, set forth in MASS. REGS. CODE tit. 505, ch. 1.00 (2003), and allows release of autopsy

reports to investigating agencies, family, and to parties in civil cases in certain circumstances. This exemption has been upheld by Massachusetts courts. *See Globe Newspaper Co. v. Chief Med. Examiner*, 533 N.E.2d 1356 (Mass. 1989).

13. Minnesota

MINN. STAT. § 13.83 (2002) divides data collected by medical examiners into public data (i.e. identification and cause of death) and investigative or nonpublic data, which is confidential. This includes autopsy photographs. Subdivisions 5 and 8 provide that this information may be released to investigatory agencies, to decedent's family or legal representative, and by court order. Under Subdivision 7, any person may petition a court for access, upon which the court can examine the data *in camera* and order disclosure "if it determines that disclosure would be in the public interest."

14. New Hampshire

N.H. REV. STAT. ANN. § 611-A:8(IV) (2002) provides that "autopsy reports are confidential medical records which shall not be released without the authorization of next of kin."

15. New Jersey

N.J. STAT. ANN. § 47:1A-1.1 (2003) states that government records subject to disclosure do not include "any copy, reproduction or facsimile of any photograph, negative or print, including instant photographs and videotapes of the body, or any portion of the body, of a deceased person,

taken by or for the medical examiner at the scene of death or in the course of a post mortem examination or autopsy." Disclosure is allowed for use in criminal actions and proceedings, by court order on a showing of "good cause," for use in forensic or medical education, or for use by law enforcement agencies. This provision was added by 2001 N.J. Laws ch. 404, approved on January 8, 2002.

Even before adoption of the above provision, New Jersey courts had held that, while the state freedom of records act did allow access to autopsy reports, it did not allow release of or access to autopsy photographs. *See Shuttleworth v. City of Camden*, 610 A.2d 903, 914-15 (N.J. Super. Ct. App. Div. 1992) (holding that autopsy photographs were not public records).

16. New York

N.Y. COUNTY LAW § 677(3)(b) (McKinney 2003) provides that coroners' records, including autopsy reports, are open to inspection by the district attorney. The spouse, next of kin or personal representative may request copies of the autopsy report, and a court may order release of autopsy reports to persons affected by civil or criminal actions or others with a "substantial interest therein." New York courts have upheld this restriction on public access. *See, e.g., Taff v. County of Nassau*, 631 N.Y.S.2d 921 (N.Y.A.D. 2nd Dept. 1995), *leave to appeal denied*, 641 N.Y.S.2d 829, 664 N.E.2d 895 (N.Y. 1995).

N.Y. COUNTY LAW § 677 does not apply within the jurisdiction of New York City, but courts have declared that New York City Charter § 557(g) provides a similar limitation on public access. *See Mitchell v. Borakove*, 639 N.Y.S.2d 791,

793 (N.Y.A.D. 1st Dept. 1996), *appeal dismissed*, 646 N.Y.S.2d 987, 670 N.E.2d 228 (N.Y. 1996).

17. North Dakota

2003 N.D. Laws ch. 384, approved on April 9, 2003, creates a new section within N.D. CENT. CODE § 44-04, makes autopsy photographs, video or audio recordings confidential and allows their release only after redacting identifying information, and only for medical or scientific teaching purposes, for law enforcement training, and for publication in medical or scientific textbooks. Family members may view the autopsy information in the office of the medical examiner if there is not an ongoing criminal investigation.

18. Oklahoma

OKLA. STAT. tit. 51, § 24A.5(1)(d) (2002) provides that "confidential medical information" in the files of the Board of Medicolegal Investigations obtained during investigations should be kept confidential. OKLA. STAT. tit. 63, § 939 provides that the chief medical examiner shall produce records or documents only after a court order made upon showing of good cause. OKLA. STAT. tit. 51, § 945 provides that a copy of the autopsy report shall be forwarded to district attorneys and law enforcement personnel. OKLA. STAT. tit. 51, § 949(D) provides that autopsy reports may be furnished to next of kin upon request.

19. Rhode Island

R.I. GEN. LAWS § 23-3-1(11) (2002) defines "vital records" as "records of birth, death, fetal death . . . and data related to those records." R.I. GEN. LAWS § 23-3-23(a) likewise

prohibits the inspection, disclosure or copying of "information contained in vital statistics records" except as authorized in regulations. R.I. CODE R. 814.1 & 814.2 provide that autopsy reports and other reports of the medical examiner are confidential, and may be released only to the next of kin or personal representative, to the insurance company with permission of the next of kin, or to the treating physician.

20. South Carolina

S.C. CODE ANN. § 17-5-535(A) (2002), adopted by 2002 S.C. Acts 350 § 2, restricts access to autopsy photographs and videos to official personnel, the next of kin, and those authorized by court order or subpoena. This statute has been amended by 2003 S.C. Acts 34 § 1, to allow use of autopsy photographs and videos for legitimate medical, scientific, law enforcement or legal training or consultation and publication, provided that identifying information is redacted.

21. Texas

TEX GOV'T CODE § 552.101 (2003) exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. CODE CRIM. PROC. ANN. art. 49.25(11) (2003) provides that, while autopsy records and the autopsy report are subject to public disclosure, "a photograph or x-ray of a body taken during an autopsy is exempted from required public disclosure." This specific restriction was added by 1999 Tex. Gen. Laws, ch. 607, § 2, effective September. 1, 1999. *See* 2003 Op. Atty Gen. OR2003-1687

(Tex., March 13, 2003) (interpreting the new statutory exemption).

22. Utah

UTAH CODE ANN. § 26-4-17(4) (2003) provides that the medical examiner shall "maintain the confidentiality" of the records, including autopsy records, and provides for their release to the county or district attorney, the attorney general or other law enforcement officer with jurisdiction, and the next of kin of the deceased, their personal representative or attending physician. *See* 1988 Op. Atty Gen. 86-52 (Utah, May 9, 1988) (disclosure of autopsy records is limited to the statutorily created classes, and others identified in other statutes).

23. Washington

WASH. REV. CODE § 68.50.105 (2003) provides that reports and records of autopsies shall be confidential. The statute allows for provision of copies of the report to: family members and personal representatives of the deceased, attending physicians, prosecuting attorneys or investigating law enforcement agencies, public health officials and the department of labor and industries in some cases.

24. West Virginia

W. VA. CODE § 61-12-10 (2003) governs the release of autopsy records and reports, and provides that they may only be released: 1) to the prosecuting attorney or law enforcement personnel, 2) to any court of law or parties to a case where the death is a material issue, and 3) to certain state agencies when authorized by law.

II. STATES WHICH PROVIDE LIMITED ACCESS TO AUTOPSY RECORDS.

1. Arizona

Autopsy Reports.

ARIZ. REV. STAT. § 11-597 (2003), states that autopsy reports are to be kept in the files of the county medical examiner, and that they may be forwarded to the county attorney where the death occurred. No restriction on access has been provided by statute.

Public Records.

ARIZ. REV. STAT. § 39-121 states that "[p]ublic records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person." Arizona courts have found a strong presumption of openness for public records in the absence of specific exemptions. *See Carlson v. Pima County*, 687 P.2d 1242, 1246 (Ariz. 1984); *cf. Mitchell v. Superior Court*, 690 P.2d 51, 53 (Ariz. 1984) ("Our statutes also evince a legislative policy favoring disclosure, unless strong countervailing considerations exist.")

On this basis, a 1988 Opinion of the Arizona Attorney General stated that there was a presumption of openness for all autopsy records, but that, under certain circumstances, these records might be closed. 1988 Op. Atty Gen. 174 (Ariz., Dec. 30, 1988). Reasons for closing the records might include "countervailing interests of confidentiality, privacy or the best interests of the state," and would be resolved on a case-by-case basis. *Id.*, quoting *Carlson*, 687 P.2d at 1246.

2. Arkansas

ARK. CODE ANN. § 14-15-304(a) (2003) makes records gathered or created during death investigations confidential, "but only until such time that the coroner issues his final report."

ARK. CODE ANN. § 12-12-312(a)(1) states that records and files in possession of the state crime laboratory "shall be privileged and confidential," and may be released only if authorized by a court of competent jurisdiction, the prosecuting attorney or the public defender assigned to the case.

ARK. CODE ANN. § 25-19-105(b)(6) exempts records pertaining to criminal investigations from public access.

A series of attorney general opinions have held that this creates a limited confidentiality for these records, including autopsy records, but only so long as they are in the possession of the state crime laboratory, or if they are part of an ongoing criminal investigation. *See* 2001 Op. Atty Gen. 2001-100 (Ark., May 9, 2001); 1997 Op. Atty Gen. 97-294 (Ark., Sept. 25, 1997).

3. Colorado

COLO. REV. STAT. § 24-72-201 (2002) makes all public records open for inspection. However, COLO. REV. STAT. § 24-72-204(6)(a) provides that the custodian of the records may apply to the district court to have certain records closed if "disclosure of the contents of said record would do substantial injury to the public interest." Colorado courts have in the past made autopsy reports open to public inspection. *See Denver Publishing Co. v. Dreyfus*, 520 P.2d 104, 107-09 (Colo. 1974); *Freedom Newspapers, Inc. v.*

Bowerman, 739 P.2d 881, 883 (Colo. Ct. App. 1987). However, recently the public interest exception has been used to close autopsy records to the public. *See Bodelson v. Denver Post Corp.*, 5 P.3d 373, 378-79 (Colo. Ct. App. 2000) (justifying limitation of access to autopsy photographs of Colombine victims on public policy grounds). The *Bodelson* court also upheld consideration of the effects of release of autopsy records on the family members of the decedent. *Id.* at 380.

4. Hawaii

Disclosure of Autopsy Reports, OIP Op. Ltr. 91-32 (Haw., Dec. 31, 1991), held that access may be withheld pending completion of law enforcement investigations, but that afterwards autopsy reports should be made available. These reports do not include photographs.

5. Illinois

No statutes explicitly apply to autopsy records. 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2002) allows for exemptions from public access for records that would constitute a clearly unwarranted invasion of personal privacy. Likewise, 5 ILL. COMP. STAT. ANN. 140/7(1)(c) allows for the exemption of investigatory and ongoing law enforcement information.

6. Michigan

Although MICH. COMP. LAWS § 15.243(1)(a) (2003) provides an exemption from public records for "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of

an individual's privacy," Michigan courts have held that this does not apply to autopsy reports because privacy rights do not survive death. *See Swickard v. Wayne County Med. Examiner*, 475 N.W.2d 304, 308-09 (Mich. 1991) (also rejecting a privacy claim by the decedent's family because an autopsy report does not include "private facts" about decedent). A recent case, *Mager v. Dept. of State Police*, 595 N.W.2d 142, 146 (Mich. 1999), suggested that in some cases, as perhaps for autopsy photographs, a court might find the release amounted to an intrusion of privacy. Information, according to the *Mager* court, is likely to be personal in nature "if it reveals intimate or embarrassing details of an individual's private life." *Id.* These two cases suggest that a Michigan court might be willing to balance privacy interests with the degree of disclosure or access requested.

MICH. COMP. LAWS § 15.243(1)(b) provides a further narrow exception to prevent disclosure of records that might interfere with law enforcement proceedings.

7. Mississippi

MISS. CODE ANN. § 41-61-65(1) (2003) provides that autopsy reports shall be issued to the following people: 1) the authorizing medical examiner; 2) the district attorney; 3) the court clerk; and 4) upon request to the immediate family of the deceased or legal representative or guardian of the deceased. No provision is made for release of these documents to any other person.

8. Missouri

MO. ANN. STAT. § 610.015 (2002) provides that public records "shall be open to the public for inspection and duplication." "Public record" is defined by MO. ANN. STAT. § 610.010(6) as "any record . . . retained by or of any public governmental body." Because MO. ANN. STAT. § 58.720.5 requires the medical examiner to retain copies of his files, the Missouri Attorney General has held that these records are public documents liable to inspection. *See* 1984 Op. Atty Gen. 11-84 (Mo., Apr. 12, 1984). More recently, Missouri courts have held that autopsy reports are not liable to release under the investigatory exception to the public records law created by MO. ANN. STAT. § 610.100.2. *See News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576, 579-80 (Mo. App. 1998) (holding that, for purposes of the public records laws, the medical examiner is a "law enforcement agency"). The implication of the investigatory exception recognized in *Cathcart*, however, is that such documents become open after completion of the investigation. *Id.* at 579 n.3; *cf.* MO. ANN. STAT. § 610.100.2 (investigative reports "are closed records until the investigation becomes inactive").

9. Montana

MONT. CODE ANN. § 46-4-123 (2002) requires preparation of an autopsy report and inclusion with the report of any death investigation. Montana has a constitutionally based right to public records, which is conditional "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." *See* MONT. CONST. art. II, § 9 (2002); *cf.* MONT. CODE ANN. § 1-6-102(3) (records "constitutionally protected from disclosure" removed from

public records law). Montana also has a strong constitutional right of privacy. *See* MONT. CONST. art. II, § 10.

Although no statute explicitly exempts autopsy records from disclosure, a Montana court would likely review the requested materials *in camera* and balance the demands of privacy against the public interest in disclosure. *See, e.g., Lincoln County Comm'n v. Nixon*, 968 P.2d 1141 (Mont. 1998) (where court authorized *in camera* review of criminal investigation documents to decide whether their release would impact privacy interests); *State v. Nelson*, 941 P.2d 441, 446-47 (Mont. 1997) (holding that the state must show a compelling interest to overcome a reasonable expectation of personal or informational privacy).

10. Nebraska

NEB. REV. STAT. § 84-712.05(5) (2002) allows for an exemption of "[r]ecords developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation. . . . " This provision would likely exempt autopsy reports at least during a pending investigation.

11. Nevada

An older attorney general opinion suggests that, while autopsy reports are public records within the meaning of NEV. REV. STAT. § 239.010 (the public records law), they are not automatically open to public inspection, but may be kept confidential to protect personal medical information. *See* 1982 Op. Atty Gen. 82-12 (Nev., June 15, 1982).

12. Ohio

OHIO REV. CODE ANN. § 313.10 (2003) makes all coroners' records public documents and guarantees access. *See State ex rel. Dayton Newspapers, Inc. v. Rauch*, 465 N.E.2d 458, 459-460 (Ohio 1984) (autopsy reports are public documents). However, access to these documents may be limited during investigations, including criminal proceedings. *Id.*

Ohio's privacy statute, OHIO REV. CODE ANN. § 1347.04(B) (2003) has been held not to limit the public's right to public records under OHIO REV. CODE ANN. § 149.43. *See State ex rel. Findlay Publ. Co. v. Schroeder*, 669 N.E.2d 835, 838 (Ohio 1996).

13. Oregon

OR. REV. STAT. § 146.035(5) (2001) provides limited access to autopsy records for the parents, spouse, children or personal representative of the deceased, as well as defendants who may be civilly or criminally liable for the death and their authorized representatives.

14. Pennsylvania

16 PA. STAT. ANN. § 1251 (2002) requires coroners to deposit official records and papers for the preceding year in the office of the prothonotary to allow public inspection. Pennsylvania courts have interpreted this requirement to mean that all coroners' documents, including autopsy reports, must be made available. *See In re Dillon*, 674 A.2d 735, 739 n.2 (Pa. Super. Ct. 1996). However, Pennsylvania courts have created a limited and temporary exception to

public access of autopsy reports during ongoing investigations. *See Com ex rel. Dist. Attorney of Blair County*, 823 A.2d 147, 16-17 (Pa. Super. Ct. 2003) (allowing the state to request a court to exempt autopsy reports from public disclosure where good cause is shown that release would impede an ongoing investigation).

15. South Dakota

S.D. CODIFIED LAWS § 1-27-1 (2003) requires that any public records must be kept available for public inspection. However, if the autopsy records relate to a potential criminal case, S.D. CODIFIED LAWS § 23-14-12 may keep the records confidential until an arrest is made. Reports, which must be filed by coroners with the bureau of criminal statistics are probably confidential under S.D. CODIFIED LAWS §§ 23-6-14 & 23-6-17. No cases have addressed release of autopsy photographs.

16. Tennessee

TENN CODE ANN. § 38-7-110(c) (2003) states that "the reports of the county medical examiners, toxicological reports and autopsy reports shall be public documents," and authorizes the department to make such documents available for a fee. However, this availability is subject to an exception in TENN CODE ANN. § 38-7-110(d) that, upon petition of the district attorney accompanied by affidavit from law enforcement officers, a court may order autopsy records to be confidential where release "may seriously impede or impair the investigation of a homicide or felony."

TENN CODE ANN. § 38-7-106(a) authorizes official autopsies only for cases "involving a homicide, a suspected homicide,

a suicide, a violent, unnatural or suspicious death." Where an autopsy is performed by request in other cases, Tennessee courts have found that the resulting autopsy reports, if not retained by the medical examiner, do not constitute public records subject to release. *See State ex rel. Cole v. Francisco*, 643 S.W.2d 105, 108-09 (Tenn. 1982) (records of private autopsy of Elvis Presley were not considered public documents).

17. Vermont

No statutes directly address access to autopsy records. VT. STAT. ANN. tit. 1, § 317(c) (2003) provides exemptions from the right of public inspection and copying. Several exemptions may be relevant. *E.g.*, VT. STAT. ANN. tit. 1, § 317(c)(2) ("records which by law may only be disclosed to specifically designated persons"); (c)(7) ("personal documents relating to an individual, including . . . information in any files relating to personal finances, medical or psychological facts concerning any individual"). VT. STAT. ANN. tit. 18, § 5205(f) states specifically that the autopsy report shall be submitted by the chief medical examiner to the "state attorney and the attorney general."

18. Virginia.

VA. CODE ANN. § 32.1-285 (2003) provides for the preparation of an autopsy report by the medical examiner, and filed with the office of the chief medical examiner, and a copy provided if a judge or attorney for the commonwealth requests the report. VA. CODE ANN. §§ 2.2-3704 makes access to all public records official state policy. Limited exceptions to the state freedom of information act are provided by VA. CODE ANN. §§ 2.2-3705 and 2.2-3706.G.1

for investigative records and certain medical records (including those which might jeopardize the privacy of any person), but no statute specifically addresses the release of autopsy records. Although death certificates themselves are confidential under VA. CODE ANN. §§ 32.1-271(A), which make these vital records, this confidentiality would not necessarily apply to the autopsy reports prepared under other statutes. *See Comment on Cause of Death of Decedent Prior to Filing Certificate of Death*, 1984-85 Op. Atty. Gen. 170 (Va., Mar. 21, 1985).

19. Wisconsin

WIS. STAT. § 19.35(1)(a) (2002) provides that, "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." The statute provides for an exception for records collected or maintained in connection with investigations. In *Journal/Sentinel, Inc. v. Aagerup*, 429 N.W.2d 772, 774-75 (Wis. Ct. App. 1988), the court of appeals used a balancing test to determine whether an autopsy report should be released, weighing the public interest in disclosure against the harm that might be caused to an ongoing criminal investigation. The court in *Aagerup* upheld the withholding of an autopsy report in that case where it was relevant to the investigation of a murder. Assembly Bill 604, introduced in the 2001 legislative session, would have made autopsy reports confidential, but failed to pass under relevant rules.

III. STATES WHICH MAKE AUTOPSY RECORDS OPEN.

1. Alabama

ALA. CODE § 36-18-2 (2003) provides that "the director [of forensic sciences] shall keep photographed or microphotographed reproductions of original reports of all investigations that he conducts in his office. Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times." *But see Stone v. Consol. Publ'g Co.*, 404 So.2d 678, 681 (Ala. 1981) (suggesting that courts may close records on the basis of public interest).

2. Idaho

No statutes address autopsy records specifically. IDAHO CODE §§ 9-335 and 9-340C (2002) contain no specific exemption for autopsy records from the state open records law. IDAHO CODE § 9-335(1) does exempt investigatory records compiled "for law enforcement purposes by a law enforcement agency," including confidentiality requirements for records that might "constitute an unwarranted invasion of personal privacy." IDAHO CODE § 9-340(4) permits limited confidentiality for records "of a personal nature," but limits this exemption to a list of financial records and vital statistics. *Stattner v. City of Caldwell*, 727 P.2d 1142, 1144 (Idaho 1986), confirmed that coroner's inquests are public hearings and their results are a matter of public record, including most medical test results.

3. Kansas

Autopsy Reports.

KAN. STAT. ANN. § 22a-233(c) (2002) requires that, "[a] full record and report of the facts developed by the autopsy

and findings of the pathologist performing such autopsy shall be promptly made and filed with the coroner and with the clerk of the district court of the county where the decedent died."

Public Records.

KAN. STAT. ANN. § 45-216(a) states that it is the "public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

In *Burroughs v. Thomas*, 937 P.2d 12, 15 (Kan. App. 1997), the Kansas court of appeals held that autopsy reports were public records and that they were not exempt from disclosure. The court noted that privacy rights in Kansas were not enjoyed by the deceased, but did not consider whether any relational right of privacy might exist on the part of family members which could justify an exemption under KAN. STAT. ANN. § 45-221(a)(30), which allows agencies to exempt records the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." The court noted that the exemption "does not apply here." *Burroughs*, 937 P.2d at 15.

4. Kentucky

Under Kentucky's Open Records Law, KY. REV. STAT. § 61.872(1) (2002), "[a]ll public records shall be open for inspection by any person, except as otherwise provided by [the Act]." This applies to any document in the possession of any public agency, including every state or local government officer. *See* KY. REV. STAT. § 61.870(1) & (2). KY. REV. STAT. § 61.878(1)(h) creates a limited exception for law enforcement records, but these records are open after

adjudication or a decision is made to take no action. An opinion of the Kentucky attorney general held that coroner's reports and autopsy reports were such investigatory reports and were exempt from disclosure until prosecution was completed or a decision was made not to prosecute. *See* Opinion Atty Gen. 82-458 (Ky. 1982).

Although there is an exception for release of records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy," KY. REV. STAT. § 61.878(1)(a), the Kentucky attorney general has opined that this protection does not survive death. *See* Opinion Atty Gen. 92-94 (Ky. 1992); 88-2 (Ky. 1988).

There have been recent unsuccessful attempts to exempt autopsy photographs from disclosure. Kentucky House Bills 77 and 582 were introduced during the 2002 regular session. Both bills would have prohibited public access to autopsy photographs, video or audio recordings, except to family members, personal representatives, for law enforcement purposes, or as directed by court order. Both bills would have permitted simple inspection of these autopsy records. HB 582 died in committee, but HB 77 was passed by the Kentucky House of Representatives, only to die in the Senate. No bills relating to autopsy photographs were introduced during the 2003 session, nor have any been pre-filed for the 2004 regular session.

5. North Carolina

N.C. GEN. STAT. § 130A-389(a) (2002) provides that copies of autopsy reports "shall be furnished to the authorizing medical examiner, district attorney or superior court

judge. A copy of the report shall be furnished to other persons upon request."

HB 645, which is currently before the North Carolina Senate, would specifically exempt autopsy photographs, video and audio recordings from the public records law. The bill would allow anyone to inspect the autopsy records, and would authorize their release to medical examiners, the district attorney, superior court judge or law enforcement personnel. Personal representatives of the deceased could obtain copies, and redacted copies might be made available for medical, scientific, law enforcement or legal training purposes and publication. A court could authorize access upon a showing of good cause.

6. New Mexico

No statutes specifically address autopsy records. N.M. STAT. ANN. § 14-2-1.A (2002) authorizes public access to all official records, with very limited exceptions, including one for ongoing investigations by law enforcement. New Mexico courts have held that the right of public access is a "fundamental right" and must be founded on a specific statutory exception. *See State ex rel. Newsome v. Alarid*, 568 P.2d 1236, 1244 (N.M. 1977).

7. Wyoming

WYO. STAT. ANN. § 16-4-203(d)(i) (2003) provides that the custodian shall "deny the right of inspection of the following records, unless otherwise provided by law: (i) Medical, psychological and sociological data on individual persons, *exclusive of coroners' autopsy reports*." [emphasis added].

No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

INTEREST OF *AMICI CURIAE*[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and other materials in furtherance of its goals of a limited and accountable government. AAPS files requests under the Freedom of Information Act (FOIA) and state equivalents. It sued to enforce the Federal Advisory Committee Act (FACA) against the Clinton Administration's Task Force on National Health Care Reform,

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

which Vincent Foster was handling when he tragically died. *Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); 58 Fed. Reg. 29,854 (1993) (Mr. Foster's court-required FACA order); 58 Fed. Reg. 28,655 (1993) (same); 58 Fed. Reg. 21,330 (1993) (same). AAPS has a strong interest in construing FOIA exemptions narrowly, and in obtaining full disclosure of the facts surrounding the death of Mr. Foster in particular. Physician members of AAPS include pathologists having medical expertise to analyze the photographs at issue for the benefit of all.

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For more than twenty years it has sought a limited and accountable government. EFELDF relies on full enforcement of FOIA in order to hold the government accountable for its actions. EFELDF has a strong interest in ensuring that information concerning the death of any high government official, including Vincent Foster, is made available to the public.

Amici have a direct and vital interest in the issues presented to this Court based on their reliance on FOIA for governmental accountability.

SUMMARY OF ARGUMENT

On July 20, 1993, Vincent Foster became the highest ranking federal government official to die in office in the thirty years after President John F. Kennedy's assassination. There is a compelling interest in obtaining full disclosure with respect to such death. Inevitably, the details about death by gunshot are tragic and unsettling. But the necessity for government accountability is not lessened by the horrifying nature of the incident. A high ranking government official was mortally wounded, and government has no authority for withholding direct evidence indicating how. All the disputed photographs should be released.

The government account pinned the entire blame for the death on the victim, Vincent Foster. Federal investigations repeatedly proclaimed the government to be innocent of any malfeasance but Vincent Foster to be guilty of suicide, an act deemed morally unacceptable by major religions. But these governmental conclusions were self-serving, exonerating the very institution that funded them and transferring all the fault to someone unable to defend himself. Undoubtedly a dozen more investigations by the federal government would reach the same result, deserved or not. Even if it was a suicide, numerous unanswered questions remain about whether the body was moved and reporting delayed in order to provide additional time to remove documents from Mr. Foster's office.

The Freedom of Information Act (FOIA) exists so that citizens may reach their own conclusions based on their own review of evidence, free from institutional bias. There is no reason to depend on hearsay about official information; it can and should be viewed directly by the objective public. Ten years later, many questions remain about whether Mr. Foster committed suicide or was the victim of murder. Post-mortem official photographs are direct evidence of the truth, and can immediately reveal the bullet wounds, direction of blood flow, and probability of assault. FOIA prevents government from forcing us to depend on its description of evidence. FOIA requires government to produce the hard evidence itself.

The privacy exemption to FOIA, Exemption 7(C), does not justify withholding these photographs. 5 U.S.C. § 552(b)(7)(C). There is no meaningful privacy interest in someone who has departed this life, just as his estate would lack any cause of action for defamation. Here, Mr. Foster's reputation could well be aided by refutation of the claim that he committed suicide. If a victim of wrongdoing by others, his plight would cry out for overdue justice. This Court

should establish that Exemption 7(C) does not extend beyond a subject's life.

Even if Exemption 7(C) does apply, redaction of only the offending portions of the photographs would fully satisfy it. Highly personal aspects of the pictures, such as Mr. Foster's eyes, could be omitted while producing portions disclosing the wounds. With computer technology, perhaps the parties could even alter the apparent identity of the victim without changing the information crucial to the investigation. At a minimum, redaction should be ordered rather than wholesale withholding of the records.

ARGUMENT

The Ninth Circuit was correct in ordering review of the photographs by the district court, though it did not go far enough in ordering their release. The reasoning of the Ninth Circuit was sound with respect to the purpose of FOIA:

> To anyone familiar with famous cases in the Old World or in the New it is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point. **[FOIA] establishes a right to look, a right to speculate and argue again, a right of public scrutiny that can be denied only if the relevant statutory exemption applies.**

Favish v. OIC, 217 F.3d 1168, 1173 (9th Cir. 2000) (emphasis added).

FOIA mandates this "right to look" so that citizens are not beholden to and wholly dependent on governmental accounts and interpretation of evidence withheld. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973). The very purpose of FOIA is to guarantee access to official information possessed by a government that has not willingly released it. The post-mortem photographs of Vincent Foster fall squarely within this mandate for disclosure.

The Ninth Circuit erred, however, in limiting FOIA by finding a broad right of privacy for relatives of the deceased under Exemption 7(C). Defamation does not survive death; nor does common law invasion of privacy. The FOIA privacy exemption is not animated by public policy like the attorney-client privilege, held to extend after death in order to promote frank communications. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Nothing about this FOIA exemption is designed to encourage action by the subject, and it cannot justify withholding official information gathered in public view about a subject who was already deceased.

The government presented a self-serving explanation of the death – that Mr. Foster supposedly committed suicide – and cannot now hide behind the privacy exemption to protect its account. Nor can relatives assert a derivative claim to privacy to prevent disclosure under Exemption 7(C).

I. FOIA EXEMPTION 7(C) IS INAPPLICABLE BECAUSE PHOTOGRAPHS TAKEN OF A PUBLIC SCENE IN A PUBLIC PARK ARE NOT "PERSONAL", NOR IS DISCLOSURE "UNWARRANTED".

According to the government, Vincent Foster killed himself in a public park, where public discovery was inevitable. If true, then he could not possibly have any reasonable expectation of privacy and there can be no privacy basis for withholding the photographs. If the government's version is untrue, then the need for release of the photographs is compel-

ling even if privacy is invaded. Either way, Exemption 7(C) does not justify withholding the photos.

Exemption 7(C) allows withholding records only if they "could reasonably be expected to constitute an **unwarranted** invasion of **personal privacy** ...." 5 U.S.C. § 552(b)(7)(C) (emphasis added). Accordingly, an invasion of privacy is not sufficient to trigger this exemption. The invasion must be of "personal" privacy, and it must be "unwarranted". Neither requirement is satisfied here.

A. The Photographs Fail to Meet the "Personal Privacy" Requirement of Exemption 7(C).

The photographs fail to meet the "personal privacy" requirement because they merely capture what was available to any member of the public who wandered into Fort Marcy Park at the appropriate time. The pictures were not taken in a home, a private hotel room or even a medical facility. They are non-medical photographs of a scene on public property in open view. The subject was fully clothed and remarkably neat. Government announced to the whole world intimate facts relating to Mr. Foster's death, leaving no cognizable privacy interest to protect in connection with the photographs themselves.

The photographs are devoid of any identifying details about Mr. Foster that would intrude on his privacy, or that of his next-of-kin, within the meaning of Exemption 7(C). In *United States DOJ v. Reporters Comm. for Freedom of Press*, this Court construed the privacy interest to be one of "identifying details" and "identifying information." 489 U.S. 749, 769 (1989). There, criminal "rap sheets" on individuals qualified for Exemption 7(C) from FOIA because they contain facts in the distant past about private citizens, not otherwise readily available to the public. The harm attendant to disclosure of one's prior criminal record is completely absent from the disclosure of blood flow on a dead body or a disputed bullet-hole in his neck. Moreover, the exemption in

Reporters Comm. did not extend to the deceased, nor to public officials; the Department of Justice released the requested rap sheets on individuals who had died.

The photographs at issue here do not contain "identifying information" about Mr. Foster, or anyone else, of a private nature. Already the government has officially declared that he had committed suicide, and nothing in the photographs could add to the harm of that personal stigma. Unlike *Reporters Comm.*, there is no identifying information, such as a criminal background, that could potentially harm the subject or even his next-of-kin. The government has already identified and disclosed all the facts that plausibly support its investigation. The standard set by *Reporters Comm.* to satisfy Exemption 7(C) is not met here.

Nor can the privacy exemption under FOIA become a derivative right claimed on behalf of individuals other than the subject himself. Privacy, if it means anything at all, must be only a personal right that terminates upon death. A "tort-like attribute limited the right of privacy to the period of the individual's life. If the justification for the right is to prevent embarrassment and personal distress, then death presumably removes the problem. Similar considerations have limited the right to sue for defamation under traditional common-law principles .... [T]he New York privacy statute restricted protection to 'any living person,' and the jurisdictions which found privacy in the common law generally followed suit." Goodenough, "Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity," 47 S.C. L. Rev. 709, 731 (1996). Nor does the individual privacy right exist for corporations. *See, e.g., Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 66 (1974) (denying an individual right to privacy to corporations because they "are endowed with public attributes" – a compelling reason to deny the right to public officials).

Every plausible articulation of a privacy right is in wholly personal terms. "Privacy ... is ... the individual's right to control dissemination of information about himself."

Breckenridge, *The Right to Privacy* 1 (1970) (quoted by *Reporters Comm.*, 489 U.S. at 764 n.16). *See also id.* (quoting Westin, *Privacy and Freedom* 7 (1967) ("Privacy is the claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others") and Project, "Government Information and the Rights of Citizens," 73 Mich. L. Rev. 971, 1225 (1974-1975) (noting that "the right of privacy is the right to control the flow of information concerning the details of one's individuality").

The photographs do not contain any information about Mr. Foster's widow or sister, or even his children, that might trigger Exemption 7(C). They may suffer offense and discomfort, and Congress has the power to pass legislation protecting them against that emotional distress. But Congress has not done so, or indicated any desire to do so. Emotional distress in third parties resultant from release of information gathered on public property about an individual may be too speculative to guard against. Moreover, Mr. Foster's children have not sued in this action to block release of the photographs. They have an interest in learning the truth here and could ultimately benefit from the requested disclosure.

B. The Photographs Fail to Meet the "Unwarranted" Requirement of Exemption 7(C).

The photographs also fail to meet the "unwarranted" requirement of Exemption 7(C), which allows withholding records only if disclosure could be "an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Warranted invasions of the personal privacy are fully subject to FOIA, and the records must be disclosed.

This Court has found disclosures to be warranted if they further "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). Where, as here, the information consists of official documents

about public images of a high-ranking government official, then disclosure is mandated to satisfy FOIA. "FOIA's central purpose is to ensure that the **Government's** activities be opened to the sharp eye of public scrutiny, not that information about **private citizens** that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm.*, 489 U.S. at 774 (emphasis added). Nothing about Mr. Foster or the circumstances of his death suggest that disclosure would be unwarranted with respect to the purposes of FOIA.

The government itself insists that it investigated the death seven different times – each time by a federal authority – an admission both of the importance of the controversy and the lack of a non-federal, independent inquiry. Brief for the Petitioner 2-5, 11 ("Pet. Br."). FOIA establishes that we need not depend only on the one-sided perspective of government in these investigations. "'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.'" *EPA v. Mink*, 410 U.S. at 105 (Douglas, J., dissenting) (quoting the historian Henry Steele Commager). These much-criticized reports on Mr. Foster's death consist of the very governmental activity deserving of the "sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774.

The purpose of the particular request is not controlling, nor is speculation about media attention after disclosure of highly sought records. *Reporters Comm.*, 489 U.S. at 772. The goal of FOIA is to advance "public scrutiny," and more of that publicity cannot disqualify records from disclosure. FOIA does not include an exemption stating that if its purpose is attained by extraordinary publicity, then the records may be withheld by government to avoid that publicity. Publicity is what FOIA supports, without limit on amount.

Nor is a request for information presumptively unwarranted in the absence of proof of wrongdoing by the govern-

ment, as the D.C. Circuit held on similar facts. *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000). "To show that the invasion of privacy was not 'unwarranted,' AIM must show 'compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence.'" 194 F.3d at 124 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991)). Nothing in Exemption 7(C) requires such a heightened showing by a FOIA requester. Rarely, if ever, would a requester even have access to such proof, and the *SafeCard Servs.* precedent should not extend beyond withholding names and addresses. 926 F.2d at 1206 ("[U]nless access to **the names and addresses of private individuals** appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.") (emphasis added). There is no proof-of-illegality requirement to FOIA requests in general, as the statute requires government accountability regardless of evidence of wrongdoing.

The position of Respondents is, at bottom, self-contradictory. Media attention on the photographs would be directly a function of their inconsistency with the official government position. If the photographs are in conflict with the published reports, then there should be media comment. Such scrutiny would be exactly what FOIA requires when the evidence does not support government claims. Some family members may welcome the possibility that Mr. Foster did not commit suicide as originally announced.

If government may withhold post-mortem pictures of a government official on the ground of privacy, then it will be impossible to scrutinize any future pronouncement about a violent death of a high public official. Such a precedent would be destructive of FOIA. Three separate courts – the District Court for the D.C. Circuit, the Court of Appeals for

the D.C. Circuit, and the District Court for the Central District of California – all held in favor of the government's assertion of the privacy exemption *without first looking* at the photographs themselves. *Favish v. OIC*, 217 F.3d at 1174 ("But no court has ever seen" the photographs. "Balancing without a knowledge of what the photos show would be an exercise in the air."). No accountability for government can survive the expansive view of Exemption 7(C) adopted by these other courts, which upheld concealment without ever viewing the evidence. Full disclosure of the photographs is warranted under FOIA.

II. Exemption 7(C) is Inapplicable to Conceal Information Related to Government Reports Concerning the Unexpected Death of a High-Ranking Government Official.

The photographs contain evidence directly relevant to continuing criticisms of governmental claims about the unexpected death of a high-ranking government official. "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964). The official reports about the death of Vincent Foster were completely self-serving, ascribing no possible fault to government and heaping blame and humiliation on the victim. FOIA ensures that citizens need not take the government's account at face value, but may view non-medical evidence directly themselves.

Petitioner's position here is at odds with its stance before this Court over five years ago, when the Office of Independent Counsel (OIC) demanded access to personal attorney-client communications of Mr. Foster. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). The OIC insisted that the attorney-client privilege does not survive death, and the D.C. Circuit held in favor of the OIC there also. But this Court

held that this privilege does survive death because it "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* at 403 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). In contrast, no such policy interest is at stake with respect to these photographs, and there is no justification for finding a right to privacy under FOIA that survives death. OIC is simply safeguarding its own reputation, not Mr. Foster's, in withholding these particular photographs. Pet Br. at 42-43 (detailing all the intimate information that the OIC did disclose about Mr. Foster in support of its reports, while refusing to release records potentially inconsistent with its claims).

The Fiske and Starr Reports by the OIC insist that Mr. Foster, who was the well-liked, number-one graduate of Arkansas Law School and the top scorer on his bar exam, suddenly committed suicide without any preparation in his work or family life. It is a conclusion that strains credibility, as suicide is very rare at that level of responsibility and observation. None of the erratic behavior associated with suicide was observed in Mr. Foster prior to his death, and his strong sense of responsibility belies such a complete abandonment. In contrast, Defense Secretary James Forrestal had formally resigned from his post and was admitted to a Navy hospital before he died plunging from its sixteenth floor.[2]

The clandestine removal of objects from Mr. Foster's office at the time of his death raises a healthy skepticism by those outside of the federal government about subsequent denials of wrongdoing. *See, e.g.*, H.R. Rep. No. 104-849, at 121-86 (asserting that White House officials were responsible for a cover-up and even obstruction of justice after Foster's death). The claims about a mutilated suicide note, missing from initial searches of Mr. Foster's briefcase and then inexplicably withheld for years from meaningful public scrutiny until examiners eventually considered it to be a forgery, do nothing to bolster the official theory. FOIA does not guarantee final answers, but does ensure that the government may not conceal evidence to safeguard its own reports.

[2] http://www.arlingtoncemetery.net/jvforres.htm (viewed 8/15/03).

Everything about the finding of Mr. Foster's body is consistent with its having been *placed* in its final location rather than his dying there. Investigators found little blood and no bullet; the gun, surprisingly, was still in his hand; the gun lacked his fingerprints; his posture was improbably straight; his shoes lacked dirt that would have been inevitable had he walked through the park; and rug fibers were all over his clothes, as though he had been rolled in a carpet and moved. The point here is not to ask the government to reopen its own investigation, but to obtain the accountability guaranteed by FOIA. This law ensures that citizens need not rely on government claims about the evidence, but may look and decide for themselves.

The photographs are not autopsy material that may warrant privacy protection, as urged by relatives of other victims. For example, the court below cited a precedent for withholding autopsy photographs of President John F. Kennedy. *Katz v. National Archives & Records Administration*, 862 F. Supp. 476, 485 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995). But autopsy photographs are part of the medical record and therefore subject to heightened standards of privacy. 68 F.3d at 1441 ("The x-rays and photographs are medical records, which are usually considered private.") (citing 5 U.S.C. § 552(b)(6), which exempts "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Moreover, the photographs of Mr. Foster are plainly agency records, in contrast to the finding that the Kennedy pictures are part of his presidential papers. 68 F.3d at 1442.

Here, the photographs taken of Mr. Foster at Fort Marcy Park were not medical at all; nor do they reveal any intimate

information. Mr. Foster was fully clothed and the photographs merely capture what was available to any passerby. Disclosure of the photographs at issue here does not require release of autopsy or other medical records about other victims. *See e.g., Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (the privacy interest in the autopsy report of a private victim falls under Exemption 6 from FOIA disclosure). Concerns about publication of medical records, like that expressed by Teresa Earnhardt as *amicus* here, are misplaced in the context of the non-medical records at issue here. Petitioner's numerous cites to examples of medical records are irrelevant to this dispute and offer no support for concealing these very public photographs. Pet. Br. at 24-26.

Congress has not created an exemption for relatives of the subject of government information, nor should this Court. Where, as here, the issue at stake is government credibility for its own investigative reports, such an exemption is particularly unjustified. "[T]he citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Exemption 7(C) does not entitle the government to escape scrutiny based on an alleged privacy interest of a deceased victim and his surviving relatives.

In contrast to other cases concerning the privacy of relatives of the deceased, the post-mortem official photographs of Mr. Foster were taken on public property by public officials. Even if a privacy right survived death – which it does not under common law – Mr. Foster himself lacked any reasonable expectation of privacy in these photographs. The interests of his relatives can be no greater than his own.

Moreover, if a legitimate privacy interest in facts of a deceased did exist, only the children as next-of-kin should have standing to assert it. Yet Mr. Foster's children have not sued to prevent release of these photographs, and their absence cannot be filled by other relatives. It may be that some relatives, perhaps even some children, favor additional scrutiny of

the government conduct here. A privacy interest under FOIA cannot extend without limit beyond the children to other relatives. The government's position implicitly rejects any meaningful limits on time and relation in asserting a privacy exemption for relatives.

The concealment of these photographs speaks volumes about the operations of government in investigating Mr. Foster's death and ferreting out, or covering up, the truth. This contrasts sharply with decisions upholding application of the Exemption 7(C) to information arising from a public tragedy. *See, e.g., New York Times Co. v. NASA*, 782 F. Supp. 628, 633 (D.D.C. 1991) (applying Exemption 6 to withhold conversations on the Challenger just prior to its explosion because "[w]hat the astronauts knew or did not know about the explosion says nothing about the operations of NASA.").

Vincent Foster served our country at a high level and died in office. The government blamed him, and him alone, for his death. FOIA enables citizens to scrutinize this self-serving conclusion by our government by accessing the photographs of Mr. Foster taken in a public park. If the photographs support the government's reports, then it has no motivation to withhold them. If, however, the photographs are inconsistent with the official account, then FOIA requires their release for that very reason. FOIA disclosures ultimately protect Vincent Foster and those like him to ensure accountability for explanations provided by our government.

The government admitted that the photographs at issue here are "some of the best evidence" of the fatal wounds, and therefore release of that evidence is essential to scrutinize the government's conclusions. *Accuracy in Media*, 194 F.3d at 124. Respondent is entitled to full compliance with his FOIA request in order to obtain this "best evidence." The government has no basis for concluding that "[t]he public's interest in matters pertaining to [Mr. Foster's] death and its investigation has been satisfied." Pet. Br. 50 (emphasis omitted). The

public's interest will not be satisfied until it gains access to the best evidence, as required by FOIA.

III. Redaction of Personal Characteristics, Not Wholesale Concealment, is All that Exemption 7(C) Could Permit Here in the Name of Privacy.

FOIA requires redaction of portions of records under Exemption 7(C) and release of the remainder. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). *See also United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 765 (1989). Only the personal characteristics of the photographs, such as Mr. Foster's eyes, nose and mouth, are even plausibly exempt from disclosure. The alleged neck wound, the isolated flow of blood, the glasses, and numerous other features of the photographs implicate no legitimate privacy interests.

The plain language of Section 552(b) requires redaction only of the exempt portions of the photographs at issue. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). A triangular black-out of the eyes, nose and mouth would satisfy this mandate, while a withholding of the complete photographs would not. Likewise, a computer-based alteration of the appearance of the subject himself would be possible while still producing essential information.

The official government position is that there was no bullet wound in the neck of Mr. Foster, who supposedly died by shooting himself in his mouth. If true, then there is no legitimate objection to releasing the portion of the photographs containing images of Mr. Foster's neck. Under the government's view, these images would be uninteresting and therefore unlikely to generate any media attention, and their publication would at most confirm what the government has said all along. There is no basis under Exemption 7(C) for withholding these images. It is only in the event that the photographs are inconsistent with the official government position that there would be media exposure – publicity that FOIA supports.

The Fifth Circuit has compelled the government to produce documents under FOIA based on this requirement of redaction. *See Cooper Cameron Corp. v. United States DOL*, 280 F.3d 539 (5th Cir. 2002). There the Department of Labor insisted on withholding 145 pages of its investigation of a petrochemical facility, citing Exemption 7 as the basis. *Id.* at 542. There, as here, the federal government defended its refusal to segregate Exemption 7(C) portions and disclose the remainder. The Court of Appeals ordered disclosure of withheld information with only names and addresses redacted. *Id.* at 554. Exemption 7(C) does not justify wholesale concealment of entire records, at least not when the subject was a high-ranking public official.

CONCLUSION

Ten photographs were taken of Vincent Foster's fully clothed body in Fort Marcy Park. To this day, the government has refused to release them for independent scrutiny. *Amici* urge full release of the photos, so that the public can draw its own conclusions from the facts.

The precedent at stake is whether the government can hide behind Exemption 7(C) to FOIA. Ten years have passed and Mr. Foster's children have not sued to block release. Respondent has agreed to redact any portion of the photos that may be offensive. Government accountability is necessary here and in future cases dependent on this precedent.

For the foregoing reasons, the post-mortem photographs of Vincent Foster should be released.

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OFFICE OF INDEPENDENT COUNSEL, PETITIONER,

v.

ALLAN J. FAVISH, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW IN SUPPORT OF RESPONDENT ALLAN J. FAVISH

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INTEREST OF *AMICUS CURIAE*

Amicus is a research center located within the School of Journalism and Mass Communication at the University of Minnesota.[1] Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series; hosts forums, conferences and symposia; produces the *Silha Bulletin*, a quarterly newsletter, and other publications; and provides information about media law and ethics to the public. Because *Amicus* believes that the Ninth Circuit's extension of "personal privacy" under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552, to include "survivor privacy" interests threatens to undermine the purpose of the Act, *Amicus* respectfully submits this brief in support of Respondent Favish.

SUMMARY OF ARGUMENT

The privacy exemptions of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6) and (b)(7)(C), are limited exceptions to that statute's general presumption in favor of disclosure. Both exemptions, which protect "personal privacy," should be construed narrowly to apply only to those individuals mentioned or depicted in the records in question. To allow a broader interpretation of the term "personal privacy" would be to ignore the inherent purpose and clear intent of the statute, as well as the noteworthy Congressional silence on any possible privacy interest held by survivors of deceased persons who are mentioned in government records.

Although this Court has said in the past that the privacy interest created by FOIA is different from either common law or

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

Constitutional privacy interests, that statement was made in a case which did not address the question of third-party privacy rights. The instant case provides an opportunity for this Court to clarify its interpretation. Wherever the outer boundaries of statutory privacy under FOIA should fall, they should not encompass the type of survivor's interests that the Petitioner attempts to assert in this case.

"Survivor privacy" is not recognized in common law tort actions. Constitutional privacy interests likewise are not descendible, expiring at the death of the individual concerned. As even the Petitioner admits, there has never been a clear indication by Congress that a "survivor privacy" interest was intended to be recognized by the original FOIA or its subsequent amendments. Because the statute is based on a strong presumption that government records should be public, the exceptions contained in the statute must be specifically defined and narrowly construed. Viewing the exemptions in light of their place in the statutory structure, as well as common law and Constitutional parallels, efforts to read a "survivor privacy" interest into the language of the statute must fail.

Many of the cases cited by both the Petitioner and by Respondent Foster family that are purported to provide a foundation for assertions of "survivor privacy" are inapposite. Some do not interpret FOIA at all. Others deal with family members' first-person privacy rights as individuals mentioned in the records sought. Still others establish "survivor privacy" simply by concluding, without appropriate analysis of the statute, that such an interest *should* exist. In another case concerning access to the Foster death-scene photographs, the D.C. Circuit held that it is "not unnatural" to view as a "privacy" interest a family's desire to avoid disclosure and their own subsequent exposure to such material.[2] Although it can be argued that it would not, in fact,

[2] *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) ("While law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy – even though the holders of the interest are distinct from the individual portrayed."), *cert. denied*, 529 U.S. 1111 (2000).

have been "unnatural" for Congress to explicitly create such a privacy interest in a disclosure statute, that does not alter the fact that Congress has neither explicitly nor implicitly created such an interest in the statutory language under consideration.

The legislatures of several states have acted affirmatively to exempt autopsy and, in some instances, death-scene photographs by amending state freedom of information laws. Amendment of the statute is the only appropriate method to create a new exemption to laws governing citizens' access to presumptively public government information.

For this Court to create, sua sponte, a "survivor privacy" exemption would encourage ambiguity and ultimately undermine the presumption of disclosure. Affirmation by this Court of Congress' stated intentions in establishing FOIA and its narrow privacy exemptions would help to delineate a clear line for both information requesters and government agencies to observe.

ARGUMENT

I. "SURVIVOR PRIVACY" DOES NOT EXIST UNDER THE STATUTORY LANGUAGE OF THE FREEDOM OF INFORMATION ACT.

The core question in the instant case is to determine what Congress meant by "personal privacy" in Exemptions 6 and 7(C). Nothing in the statutory language or legislative history suggests that the answer to this question includes individuals who are not themselves mentioned in a government record. By contrast, the legislative history, the common law, and Constitutional concepts of privacy all indicate that no such interest could reasonably have been intended by Congress when it enacted and amended the Freedom of Information Act.

A. Exemption 7(C) extends only to individuals who are mentioned in government records.

As enacted in 1966, Exemption 7 of the Freedom of Information Act applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. § 552(b)(7). Exemption 6 created a personal privacy exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In 1974, Congress amended FOIA to create a personal privacy standard under Exemption 7(C), in part to address the serious problem of government agencies' and courts' expansive interpretation of Exemption 7 as justifying blanket withholding of law enforcement records. Sen. Philip Hart, who sponsored the amendment creating 7(C), said on the Senate floor that the amendment "simply make[s] clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption." 120 Cong. Rec. 17,033 (1974).

In 1986, Congress amended Exemption 7(C) to reaffirm the presumption of access unless disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The nature of privacy interests mentioned in the two exemptions, however, is fundamentally the same. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (holding that "identical words used in different parts of the same act are intended to have the same meaning"). Moreover, the 1986 change in 7(C) from "would constitute" to "could reasonably be expected to constitute" was intended merely to codify the approach that courts should take in determining the degree of risk that disclosure would produce. 132 Cong. Rec. S16,496 (1986) (statement of Sen. Patrick Leahy). Once a valid privacy interest has been identified, courts may use different standards in Exemption 6 and 7(C) to balance the risks associated with disclo-

sure against the public interest served by disclosure. But any effort to portray the privacy interest embodied in 7(C) as more expansive than the interest embodied in Exemption 6 is misplaced.

Exemption 6 was intended to prevent injury or embarrassment to those whose personal information is contained in government files. *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). By contrast, Exemption 7's primary aim is to protect the government's interest in keeping information secret. Exemption 7 protects paid informants, individuals mentioned in law enforcement files, and the identities of law enforcement personnel who could be subjected to harassment because of their roles in investigations. 5 U.S.C. § 552(b)(7)(A-D). *See Heller v. U.S. Marshals Serv.*, 655 F. Supp. 1088 (D.D.C. 1987) (holding that polygraph examinations of public official cleared of wrongdoing fell within Exemption 7(C) where redaction of that official's name would be insufficient to protect his privacy). *See, e.g., Powell v. Dep't of Justice*, 584 F. Supp. 1508, 1525 (N.D.Cal. 1984) (holding that identities of FBI agents may be withheld to spare the agents "annoyance and harassment," and that records concerning individuals being investigated or who are associated with investigations are also appropriate for exemption under 7(C)). Protecting individuals explicitly mentioned in law enforcement records from the embarrassment or humiliation of being associated with a criminal investigation is a far different matter from protecting third parties not mentioned in law enforcement records from discomfort or distress.

1. *The plain language of the statute makes clear that "privacy" is limited to those individuals mentioned in the records in question.*

When interpreting the meaning of a statute, analysis must begin with the plain meaning of the statutory language of the statute itself. *Bailey v. United States*, 516 U.S. 137, 144 (1995) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). The dictionary definition of "personal" is "of or

peculiar to a *certain person*; private; *individual*." *Webster's New World Dictionary* 1008 (3d coll. ed. 1988) (emphasis added). "Private," according to *Webster's*, means "of, belonging to, or concerning a particular person or group." *Id.* at 1071. "Personal privacy," therefore, necessarily refers to a privacy interest that is limited to a specific individual. Under that interpretation, the inquiry, both as to the meaning of the statute and as to the legitimacy of "survivor privacy" under FOIA, comes to an end. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990) (citing *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989)).[3]

2. *Petitioner's interpretation of "personal" privacy is contrary to the meaning compelled by statutory interpretation.*

Questions of statutory interpretation arise in the instant case only if one attempts to infer some hidden meaning beyond that clearly and plainly intended by the statutory language. The Petitioner proposes an implausible meaning for the word "personal" in Exemption 7(C) that is contrary both to the plain language of the statute and to the meaning compelled by interpretive tools laid down by this Court.

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[3] In *Tax Analysts*, this Court stated:

> In enacting the FOIA, Congress intended to curb this apparently unbridled discretion by clos[ing] the loopholes which allow agencies to deny legitimate information to the public. Toward this end, Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under § 552(a) unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.

492 U.S. at 150-51 (internal quotation marks and citations omitted).

The Petitioner contends that the word "personal" serves merely to distinguish between "natural *persons* rather than corporations or other entities." Pet'r Br. at 18 (emphasis in original). This argument contradicts well-established principles laid down by this Court. As the Court noted in a recent opinion, written by the Chief Justice, unless Congress dictates otherwise, courts should begin their interpretation of statutory language with the presumption that a statutory term carries its common law meaning. *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393 (2003) (citing *Taylor v. United States*, 495 U.S. 575, 592 (1990); *Morissette v. United States*, 342 U.S. 246, 263 (1952)). For Congress to say that personal privacy refers only to privacy of "natural persons" and not corporations would be redundant, because no common law right of privacy for corporations exists. Restatement (Second) of Torts § 652I cmt. c (1977) ("A corporation, partnership or unincorporated association has no personal right of privacy."). Therefore, because Congress intends that every word in a statute should have meaning, the word "personal" must have been included for purposes other than to differentiate between a corporation's privacy interests and a natural person's privacy interests. *Bailey*, 516 U.S. at 145 (quoting *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58 (1879) ("[A] legislature is presumed to have used no superfluous words.")). The reasonable conclusion is that "personal" was used as a modifier to limit an otherwise ambiguous term to a narrow group of people – namely, those who are mentioned by name in the government records in question.

This interpretation of the privacy interest was recognized by this Court in *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). In that case, this Court noted that "both the common law and literal understandings of privacy encompass the *individual's control of information concerning his or her person.*" 489 U.S. at 763 (emphasis added). Although the Court stated that the privacy interest identified by FOIA differs from both com-

mon law tort privacy and Constitutional privacy, it is clear that those definitions inform the statutory meaning.[4]

Under common law, "the right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his." Restatement (Second) of Torts § 652I, cmt. a (1977). The Restatement also makes clear that no action may be maintained by family members of a deceased individual whose privacy was invaded, unless such action is *specifically* authorized by statute. *Id.* cmt. b (emphasis added); *see, e.g., Swickard v. Wayne County Med. Exam'r*, 475 N.W.2d 304 (Mich. 1991); *Cordell v. Detective Publ'ns*, 419 F.2d 989 (6th Cir. 1969);[5] *but see Cox Broad. Corp. v. Cohn*, 200 S.E.2d

[4] The Court, after a brief discussion of the dictionary definition of privacy, provided a footnote supporting definitions of privacy that were limited to an individual's control over information about himself. Three definitions were drawn from secondary sources: "Privacy . . . is the rightful claim *of the individual* to determine the extent to which he wishes to share of himself with others. . .;" "Privacy is the claim *of individuals* . . . to determine for themselves when, how, and to what extent information *about them* is communicated to others;" "[T]he right of privacy is the right to control the flow of information concerning the details *of one's individuality*." 489 U.S. at 764 n.16 (citations omitted) (emphasis added).

[5] In *Cordell*, the defendant wrote an article concerning the murder of the plaintiff's daughter. The Sixth Circuit ruled that the plaintiff could not bring an action for public disclosure of private matters, emphasizing that such a cause of action can only be asserted by subjects of the publication. The court stated that "the right lapses with the death of the person who enjoyed it, and one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship." 419 F.2d at 990-91. The court went on to discuss the policy behind the rule:

> The policy underlying these limitations is not hard to discern. The law is not unwisely wary of actions for injury which is purely emotional; the danger of spurious claims is too great. As one court put it, "if the right asserted here were sustained, it would be difficult to fix its boundaries. How distant a relative could sue? At what relational distance does the danger of feigned claims overcome the likelihood of real emotional distress?"

Id. (citations omitted).

127 (Ga. 1973) (allowing father of deceased rape victim to bring common law tort claim against company that broadcast the victim's name), *rev'd on other grounds*, 420 U.S. 469 (1975).[6]

Similarly, the Constitutional right of privacy does not extend beyond death and does not descend to the heirs of the deceased. *United States v. Amalgamated Life Ins. Co.*, 534 F. Supp. 676, 679 (S.D.N.Y. 1982); *Helmer v. Middaugh*, 191 F. Supp.2d 283, 285 (N.D.N.Y. 2002) ("Even assuming all of the facts in favor of the plaintiff, a dead man does not have any constitutional rights."); *Estate of Conner v. Ambrose*, 990 F. Supp. 606, 618 (N.D.Ind. 1997) ("After death, one is no longer a 'person' within our constitutional and statutory framework and has no rights of which he may be deprived.").

No natural reading of the statutory language, without additional indications either in the statute or in the legislative history, allows the conclusion that "personal privacy" was meant to extend beyond those individuals whose personal information is contained in government records.

B. The FOIA Exemptions must be construed narrowly to exclude "survivor privacy" interests.

1. *The statute's fundamental presumption of disclosure compels a narrow interpretation of exemptions.*

The statutory language of FOIA carves out nine specifically delineated exemptions to mandatory disclosure of government

[6] This Court in *Cox* did not consider the validity of the father's claim that his own privacy was violated through the publication of his daughter's name as the victim of a rape that ended in murder. Instead, this Court deferred to the finder of fact on that question.

records. Those exemptions, like all of the statute's provisions, should be interpreted in light of the fundamental goal of the statute, which is to provide the fullest possible disclosure. *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, at 3 (1965), which states that FOIA carries a "basic philosophy of full agency disclosure"); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).

The idea that statutory provisions should be interpreted in light of the statute's fundamental policy is not unique to FOIA. It is a widely accepted tenet of statutory interpretation. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (holding that statutory provisions should be interpreted in light of the "design of the statute and to its object and policy"); *Richards v. United States*, 369 U.S. 1, 10 (1962); *SEC v. Joiner*, 320 U.S. 344, 350 (1943). Based on that interpretive guidance, it is clear that, given multiple possible interpretations of the term "personal privacy," this Court should select the meaning that best furthers the goal of the fullest possible public access to government records.

2. *Petitioner has not provided evidence of Congressional intent to expand privacy interests beyond those of individuals specifically mentioned in government records.*

As the Petitioner asserts, this Court has held that FOIA's exemptions "are intended to have meaningful reach and application." Pet'r Br. at 14 (quoting *John Doe Agency*, 493 U.S. at 152). Such "meaningful reach" is provided by an interpretation given by Senator Hart, who sponsored the 1974 amendment that created Exemption 7(C). During Senate floor debate, Sen. Hart specifically described the personal privacy exemption as "intended to protect the privacy of any person *mentioned* in the requested files, and not only the person who is the subject of the investigation." 120 Cong. Rec. 17,033-34 (1974) (emphasis added).

Once a valid privacy interest is found under Exemption 7(C), personal information contained in law enforcement records cannot be disclosed unless the privacy interest is outweighed by a public interest in what the government "is up to." *Reporters Committee*, 489 U.S. at 774. As *Reporters Committee* and subsequent cases have shown, that public interest requirement represents a significant hurdle for requesters. To erect an even higher barrier for requesters by extending privacy interests to those not mentioned or portrayed in government records would undermine the basic philosophy and underlying aims of FOIA.

Had the exemption been intended to extend beyond those individuals explicitly mentioned in law enforcement records, Sen. Hart's remarks would have been likely to include some mention of that. To infer that legislative intent, without more, would be to disregard traditional common law and Constitutional notions of privacy, and adopt a greatly expanded statutory definition of privacy which is without support in either the plain language of the statute or in the legislative history.

The Petitioner asserts that Congress' failure specifically to exclude "survivor privacy" from the statute provides evidence of intent to include it. Pet'r Br. at 18. This assertion disregards the role of the exemptions in the overall statutory scheme. The mandatory disclosure of government information under FOIA can be overcome only by an exemption created by "clearly delineated statutory language." *Rose*, 425 U.S. at 360-361 (citation omitted). Failing to exclude an interest can hardly be seen as embracing that interest, especially when it is one that Congress, looking to the common law, would not expect to be included in the notion of "privacy." Congress also failed to specifically exclude potential privacy interests of former bowling league teammates or grammar school friends, but it scarcely could be argued that such exclusions compel the judicial acknowledgment of those interests.

Second, the Petitioner points to two memoranda from Attorneys General which appear to support an interpretation of Exemption 7(C) that extends to family members or descendants. Pet'r Br. at 18. Although it is not surprising that the Attorney General would attempt to minimize the burden on the Justice Department by narrowing the range of records that must be disclosed under the statute, these administrative interpretations have no bearing on the legislative intent behind the statute. Nor should they control this Court's determination of the proper reach of the statute's exemptions. Agencies' interpretations of statutes – even those they are charged to enforce – are not controlling, and agency decisions should not be "rubber-stamp[ed]" if they run counter to the stated purposes of those statutes. *Dep't of Navy v. FLRA*, 840 F.2d 1131, 1134 (3d Cir. 1988) ("[N]o deference is owed an agency's interpretation of a general statute.").

II. THE CASE LAW CITED IN SUPPORT OF "SURVIVOR PRIVACY" IS INAPPOSITE OR FLAWED, AND SHOULD NOT BE REGARDED AS BINDING PRECEDENT IN THE INSTANT CASE.

Several cases that Petitioner contends recognize a familial or "survivor privacy" interest under FOIA in fact merely affirm the stated Congressional intention that FOIA's privacy protections extend to individuals who are named or depicted in records but are not themselves the subject of the records. *See Dep't of State v. Ray*, 502 U.S. 164 (1991); *Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148 (7th Cir. 1987); *Lesar v. Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980). Other cases, such as *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476 (D.D.C. 1994), are inapposite because FOIA and its exemptions are not applicable to the requested materials. Another case frequently cited by the Petitioner and others who seek a pedigree for "survivor privacy" is *New York Times v. NASA*, 920 F.2d 1002, 1010 (D.C. Cir. 1990). The *NASA* opinion was the product of a court that split 6-5 and stands as an example of tragic facts making bad law, a trait that is a hallmark of many cases where courts have recognized "survivor privacy."

A. Cases where the personal privacy interest belongs to individuals named or depicted in the records sought are inapposite.

In *Dep't of State v. Ray*, the Court upheld the redaction of individuals' names from summaries of interviews of returned Haitian emigrants conducted by the State Department. These records were requested by a Florida lawyer and his three clients, Haitian nationals seeking political asylum in the United States. 502 U.S. at 168. As part of immigration proceedings, the records were sought in order to show that Haitians who attempted to immigrate to the United States illegally and were subsequently returned to Haiti would "face a well-founded fear of persecution." *Id.*

Many of the interview summaries contained "personal details about particular interviewees" including "highly personal information regarding marital and employment status [and] children." *Id.* at 175-176. Family members were named as a part of the record and therefore had privacy interests independent from the privacy interests of the interviewees. Read broadly, as Petitioner urges, *Ray* would protect from disclosure any record that could subject any family member – whether named in the record or not – to "embarrassment in their social and community relationships." *Id.* at 176 (citation omitted). This would create not a "survivor privacy" interest, but a familial privacy interest for family members of the living. Such an interest would undercut FOIA's purpose by stretching the meaning of "personal privacy" to encompass anyone who has a family member who has exposed them to potential embarrassment.

Respondent Foster family cites *Lesar* as an example of judicial recognition of "survivor privacy" to protect the privacy of family members. Resp't Br. at 24. It is true that, in *Lesar*, the D.C. Circuit upheld the withholding of "information allegedly of

a personal nature concerning Dr. [Martin Luther] King [Jr.]'s family and associates." 636 F.2d at 487. However, the privacy interests being weighed were not, as is often stated, "survivor privacy" interests.[7] Instead, the interests were those of family members and associates who were themselves named in the records. The same is true of *Marzen v. Dep't of Health & Human Servs.*, 825 F.2d 1148, where the Seventh Circuit recognized that the parents of a deceased baby could assert a privacy interest when their own actions and decisions to withhold medical treatment were part of the record.

B. The court in *Katz* recognized a proprietary interest, not a "survivor privacy" interest, in protecting autopsy photos from disclosure.

Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, has been cited frequently and erroneously, including by Petitioner, as an example of judicial recognition of a "survivor privacy" interest. In *Katz*, the district court denied access to the autopsy materials of President Kennedy out of concern for the privacy of the Kennedy family. *Id.* But because of the unique legal status of the Kennedy autopsy materials, the case cannot be seen as precedent for judicial or Congressional recognition of a broad "survivor privacy" interest under FOIA.

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[7] In *Lesar*, the D.C. Circuit made clear that it was protecting family members and associates from direct invasions of their own personal privacy interest:

> [W]e must consider whether the district court correctly found that the materials in question fell within the scope of Exemption 7(C). To recall briefly, these materials are of two types: the names and other identifying data of FBI agents and informants involved in the FBI's investigations of Dr. King and information allegedly of a personal nature concerning Dr. King's family and associates.

636 F.2d at 487. Although the D.C. Circuit did recognize a privacy interest in avoiding "annoyance or harassment," as the Petitioner asserts, the court made clear that this interest was held by the FBI agents named in the files, not by King's family and associates. *Id.* at 487; Pet'r Br. at 23.

The Kennedy family donated the autopsy materials to the National Archives by deed of gift under the Presidential Libraries Act, placing restrictions on their access and disclosure as allowed by the Act. *Id.* at 478; 44 U.S.C. § 397 (1964). In 1992, Congress recognized the validity of this deed of gift in the President John F. Kennedy Assassination Records Collection Act. *Katz*, 862 F. Supp at 482; Pub. L. No. 102-526, 106 Stat. 3443 (1992). The deference that Congress paid to the Kennedy family was tied to a specific law, and cannot be read as an endorsement of a general "survivor privacy" right granted by Congress under some other statute. Indeed, Congress' need to specially codify the Kennedy family's privacy interest indicates that Congress did not recognize an established "survivor privacy" interest inherent in FOIA.

Although the district court in *Katz* held, in the alternative, that the privacy interest of the Kennedy family outweighed the public interest in disclosure of the autopsy materials, the decision to withhold the autopsy materials was affirmed on other grounds by the D.C. Circuit. *Katz*, 862 F. Supp. 485-86, *aff'd on other grounds*, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that the autopsy materials are not and never were "agency records" subject to FOIA).

Both Congress and the courts have recognized that the deed of gift under the Presidential Libraries Act, not FOIA, governs access to the Kennedy autopsy materials. Because access to these materials is controlled by the Kennedy family, not the government, *Katz* cannot be seen as useful precedent for the development of "survivor privacy" as a basis for government withholding of material under FOIA.

C. *New York Times v. NASA* illustrates why Congressional, not judicial, action is required to create a "survivor privacy" interest under FOIA.

The Challenger disaster was an example of tragic facts making bad law. *See Favish v. Office of Indep. Counsel*, 217 F.3d

1168, 1173 (9th Cir. 1999) ("It could, no doubt, be suggested that the . . . astronauts so tragically destroyed were special cases, leading to special solicitude for the feelings of their families"). The five dissenting judges in *New York Times v. NASA* correctly argued that the majority erred when it held that the Challenger tape was a "similar file" under Exemption 6. 920 F.2d at 1010. The words of the dissent, although written in the context of the threshold question of Exemption 6 (whether the tape was a medical file, personnel file, or similar file), are equally applicable to the issue of recognizing "survivor privacy" here: "The result reached today defies the will of Congress as expressed in the statute. We dissent because we believe that we are constrained to enforce the statute as it was written by Congress." *Id.* at 1011.[8] The dissent noted that the majority opinion found that "the withheld tape contains no information about the personal lives of the Challenger astronauts or any of their family," and concluded "[W]e are not at liberty to rewrite FOIA to defeat ~~an unseemly~~ request. . . . Any needed repairs to the way in which privacy concerns are protected . . . must be undertaken by Congress, not by the courts." *Id.* at 1018 n.10.

D. Surviving family members who are not named or depicted in the records sought do not have a personal privacy interest under FOIA.

Courts have held that the survivors of individuals who are the subjects of a government record have no "survivor privacy" interest whatsoever that would justify withholding the records. In *Diamond v. FBI*, a university professor sought disclosure of FBI documents relating to government surveillance of academics, including himself, during the McCarthy era. 532 F. Supp. 216,

[8] The D.C. Circuit in *Accuracy in Media, Inc. v. Nat'l Park Serv.* declined to settle the dispute of whether the "survivor privacy" language of *New York Times v. NASA* was holding or dictum. 194 F.3d at 123. Instead, the court found "survivor privacy" via *Campbell v. Dep't of Justice*, 164 F.3d 20, 33-34 (D.C. Cir. 1998). *Id.*

219 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984). The Second Circuit found that the death of those persons mentioned in the requested files had so diminished their privacy interests as to amount to waiver. *Diamond*, 707 F.2d at 77. In finding that death essentially destroyed the privacy interest of these named individuals, the court did not weigh the privacy interest of the survivors of these individuals at all. *Id.* Because the court ordered the disclosure of these records without placing "survivor privacy" interests in the balance between personal privacy interests and public interest, one can reasonably infer that the court assigned no weight to these interests.

In *Rabbitt v. Dep't of Air Force*, the court held that under Exemption 6, the plaintiff was entitled to the medical records of a ground crew member who was killed in an accident that also killed plaintiff's husband, but that she was not entitled to the records of an airman who survived the accident. 383 F. Supp. 1065 (S.D.N.Y. 1974). The court reasoned as follows: "[W]e fail to perceive any invasion of privacy in releasing the medical report of the deceased ground crew member. Release of the medical information relating to the surviving occupant falls in a different category. . . . [S]uch reports may contain embarrassing information." *Id.* at 1070. Similarly, in *Kyle v. United States*, the plaintiff, the widow of an Air National Guard pilot killed in a crash, was entitled to the autopsy report of the weapons officer who was also killed in the crash. 1987 WL 13874 (W.D.N.Y.). The court found no part of the autopsy report was protected from disclosure under Exemption 6. *Id.* at 1.

III. LEGISLATURES HAVE THE POWER TO AMEND OPEN-RECORDS STATUTES TO EXEMPT MATERIAL FROM DISCLOSURE IF THEY DETERMINE THAT PUBLIC POLICY SO REQUIRES, BUT IT IS NOT THE ROLE OF THE COURTS TO DO SO.

The issue of public access to autopsy photographs became a topic of national interest in early 2001, following NASCAR driver

Dale Earnhardt's death resulting from a crash during the Daytona 500. Under Florida public records laws in place at the time, autopsy photographs were considered public documents not subject to privacy exemptions. *See, e.g., Williams v. City of Minneola*, 575 So. 2d 683 (Fla. Dist. Ct. App. 1991). Four days after her husband's death, and one day before the first public records request for autopsy photographs was made by the *Orlando Sentinel*, Teresa Earnhardt petitioned for a temporary restraining order barring release of the photographs pending consideration of the family's right to privacy under the Florida and U.S. Constitutions. *See Earnhardt v. Volusia County Office of Med. Exam'r*, 2001 WL 992068 (Fla. Cir. Ct. 2001).

The Florida legislature quickly amended the state's public records law to create Chapter 2001-1 expressly exempting autopsy photographs from disclosure. Fla. Stat. Ann. § 406.135 (West 2002). In *Earnhardt*, the court praised the legislature for its wisdom "in recognizing that autopsy photographs, of all things, should be presumptively private; that is, they will not be shared with the public, even though they were in the very public hands of the government, unless it can be established that good cause exists" for their review. 2001 WL 992068 at 5. Although the Petitioner relies heavily on the words of the Florida court, they are little more than dicta supporting the actions of the state legislature. *See* Pet'r Br. at 29.

The Florida court's holding in *Earnhardt* offers no support for the Petitioner's contention that it is appropriate for this Court to find a "survivor privacy" interest in the federal FOIA. To the contrary, *Earnhardt* demonstrates that the only way in which such an interest should be established is through an act of the legislature.[9]

[9] The Florida statute created to protect Dale Earnhardt's autopsy photographs from public disclosure was upheld as Constitutional in *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002), *rev. denied*, 848 So. 2d 1153 (Fla. 2003) (table no. SC02-1635).

Although the Earnhardt case is the most-publicized example of a state legislature exempting autopsy photographs or reports from open-records laws, other states have acted similarly. *See, e.g.*, 2002 S.C. Acts 350; Ind. Code Ann. § 5-14-3-4(a)(11) (2003); Wyo. Stat. Ann. § 16-4-203(d)(i) (1977).[10]

Legislatures have the authority to restrict public access to materials such as autopsy or death scene photographs if they determine that public policy so requires. Presumably, if courts are compelled to order the disclosure of material that some find disturbing because of a legislature's failure to foresee the consequences of its open-records laws, the legislature will act to change the law. But it is not the role of the courts to do so, sua sponte. *E.g., Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) ("[E]ven where a legislative choice of policy is perceived to have been unwise or simply not the optimum choice . . . federal courts must defer to that legislative judgment.").

IV. RECOGNIZING "SURVIVOR PRIVACY" UNDER FOIA WOULD CREATE PRECEDENT FOR FURTHER EXPANSION OF STATUTORY EXEMPTIONS THAT WOULD FRUSTRATE THE FUNDAMENTAL PURPOSE OF THE STATUTE.

The finding of a "survivor privacy" interest under FOIA would do more than slightly adjust the calculus of disclosure. It would completely reverse the underlying presumptions of the Act in situations where first-person privacy interests have been waived, diminished by public-official status, or extinguished by death.

FOIA is founded upon a presumption of disclosure of government records. *Rose*, 425 U.S. at 360-36; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). If no valid personal privacy interest exists (in the absence of other applicable exemp-

[10] Some states, however, have declined to exempt autopsy records and/or photographs from open-records laws. *See, e.g.*, A.B. 604, 2001-2002 Assembly (Wis. 2002); H.B. 77, 2002 Leg., Reg. Sess. (Ky. 2002).

tions), the government must disclose the records. Where a valid privacy interest is found, however, the dynamic is reversed. The requester must then show not only that the documents will serve a public interest, but that they will serve the narrowly-drawn public interest defined by this Court in *Reporters Committee* as revealing "what the government is up to." 489 U.S. at 773. Such a radical change should not be made without a showing of Congressional intent to do so.

A. "Survivor privacy" easily could evolve into a generalized "family privacy" interest.

A "survivor privacy" right could significantly alter the disclosure equation in cases involving public officials or cases in which the subject of the records somehow has waived his privacy interest. *See, e.g., Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977); *Lesar*, 636 F.2d 472; *Diamond*, 707 F.2d 75. If family members who survive a deceased individual who is the subject of a government record also have a valid privacy interest in preventing disclosure of that record, it is only logical that family members of a still-living subject of government records would have an interest in preventing disclosure. Thus, even in situations where an individual has waived his privacy interest, the government could withhold documents on the basis of family members' privacy rights, unless the requester could provide evidence of a strong public interest as defined by this Court in *Reporters Committee*.

The circuit courts whose decisions are implicated in the instant case tailored their "survivor privacy" exemption to address only the interests of family members in avoiding graphic or emotionally disturbing images of a deceased loved one. *Accuracy in Media*, 194 F.3d 120; *Favish*, 217 F.3d 1168. That does not mean, however, that future courts would continue to limit application of family privacy interests to such a situation. Indeed, the disclosure of records, such as photos, videotape or audiotape of a loved one engaged in illegal or immoral acts would almost

certainly cause pain and humiliation to family members, whether or not the subject of the record was alive.

The dangers of such a broad application are particularly significant in the context of the privacy interests of public officials.[11] In such cases, a requester ordinarily would have to show only a modest public interest to overcome an official's diminished privacy interest. If, however, family members of these public officials could claim privacy interests in avoiding embarrassment or humiliation that could result from disclosure of records concerning their loved ones, the requester would be forced to present clear evidence of a *Reporters Committee* public interest strong enough to overcome the family members' undiluted privacy interests in order to compel disclosure. As a result, the general presumption of disclosure under FOIA would be dramatically curtailed.

Moreover, as a result of such an interpretation, FOIA would treat records concerning individuals who were married or had living relatives differently from records concerning individuals who were unmarried or had no living family members. Such an inequality in application is neither sensible nor appropriate in light of the Act's fundamental policy of full disclosure.

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[11] Despite the Petitioner's assertions to the contrary, it is well accepted that public officials' privacy interests are reduced by virtue of their positions. *See, e.g., Lesar,* 636 F.2d 472 (holding that FBI agents' privacy interests related to their work activities are diminished); *New York Times v. Sullivan,* 376 U.S. 254 (1964). Judge Starr also advocated such an approach in his dissent in *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (stating that, for guidance in fleshing out the balance between privacy interests and public interest "it seems sensible . . . to draw upon the substantial body of defamation law dealing with public personages").

B. The recognition of "survivor privacy" would greatly increase the government's burden under FOIA and could lead to unjustified withholding of records that should be disclosed.

Under FOIA, the burden is on the agency to justify withholding. If this Court recognizes a "survivor privacy" interest, the burden of determining whether the survivors of deceased individuals are themselves alive or dead would fall on the government. *Schrecker v. Dep't of Justice*, 217 F. Supp.2d 29, 36 (D.C. Cir. 2002) ("An agency must make a reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7(C)."") (internal quotation marks omitted).

It requires a considerable expenditure of resources to determine whether named parties in requested files are alive or dead. *See, e.g., Diamond*, 532 F. Supp. at 77 n.2 (finding that the FBI, as part of "extensive search," reviewed nearly 200,000 pages of documents to determine whether named parties had waived privacy interests through death, public disclosure, or consent); *Campbell v. Dep't of Justice*, 193 F. Supp.2d 29, 40 (D.D.C. 2001) (finding that the FBI employed 100-year test,[12] a publication entitled *Who Was Who*, and "general institutional knowledge" to determine whether individuals were dead or alive); *Schrecker*, 217 F. Supp.2d at 37 (using *Campbell* methodologies as well as Social Security Death Index when social security number of person was known).

Recognizing "survivor privacy" means taking an exponentially more costly step. Once a named party is found to be dead, the government will be forced to determine whether "those tied closely to the deceased by blood and love" are themselves alive or dead. *Favish*, 217 F.3d at 1173. This task is not as simple as merely reading an obituary. At a minimum, for example, if an individual

[12] The 100-year test assumes that individuals who would be more than 100 years old are dead for the purposes of balancing private versus public interests. *Campbell*, 193 F. Supp.2d at 40.

who was the subject of a record died, an agency would be faced with first determining who that person's loved ones and close relations were. Second, the agency would need to determine which of these individuals were tied closely enough to the deceased to have a "survivor privacy" interest. Third, the agency would need to determine if these individuals were still alive and, if so, whether they object or consent to release of the records.

Rather than undertaking such exhaustive searches, agencies would instead be likely to err on the side of caution and to withhold all records concerning deceased individuals, whether identifiable surviving relatives existed at all. The case of *Outlaw v. Dep't of the Army*, 815 F. Supp. 505 (D.D.C. 1993), illustrates this problem. In *Outlaw,* a former army sergeant convicted by court-martial of murder and who had served his sentence sought to clear his name through analysis of death scene photographs of the victim.[13] The Department of the Army denied the sergeant access to the pictures on the basis of Exemptions 6 and 7(C). The district court ordered release of the photographs, finding that the government's "concern for the privacy of the decedent's surviving relatives has not extended to an effort to locate them to determine whether they object to the release." *Id.* at 505. And, as the court noted, "Most important, there is no showing by defendant that, as of now, there are any surviving relatives of the deceased, or if there are, that they would be offended by the disclosure." *Id.* Nevertheless, costly and time-consuming litigation resulted from the government's decision to withhold this information.

If this Court recognizes a "survivor privacy" exemption to FOIA, such scenarios would become commonplace. An agency

[13] The Petitioner's Brief raises the specter of "child molesters, rapists, murderers, and other violent felons" requesting images of their victims. Pet'r Br. at 29. Congress considered providing authority to the Attorney General to limit requests by felons, but failed to pass such an amendment. S. Rep. No. 221, at 29 (1983).

would withhold records, even from a requester seeking to uncover government illegality, fraud, or waste. Although FOIA places the burden "on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B), an agency could always claim that its search for survivors continues in perpetuity, delaying disclosure indefinitely lest it disclose information that implicates the "survivor privacy" interest of an overlooked relative or loved one. In such a case, the requester, for all practical purposes, would bear the burden of disproving the existence of some hypothetical third-party survivor's privacy interest. Such a result directly contradicts the language and intent of the statute.

If this Court recognizes "survivor privacy," government agencies will require guidance far beyond a holding that the personal privacy of 7(C) "extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Favish*, 217 F.3d at 1173. In determining the breadth of "survivor privacy," these agencies will need to be not only historians and genealogists, but sociologists as well. How "close" does "tied closely" mean? How is "family" defined? Does a deadbeat dad have a "survivor privacy" interest because he is "tied by blood" to the deceased? Does a domestic partner have this interest because she is "tied by love"? Would a fiancée? Would an ex-husband? Do the biological parents of an adopted child have a "survivor privacy" interest? The Court would spur massive litigation because the government would wish to sound the depths of "survivor privacy." If public policy dictates the creation of such a privacy interest, it should be undertaken only through informed, carefully-drafted and explicit legislation.

CONCLUSION

"Survivor privacy" is a legal concept without support in the plain meaning of FOIA's statutory text, in the legislative history, or in common law or Constitutional notions of privacy. That has not prevented some lower courts from creating an independent privacy interest for survivors of deceased individuals mentioned

or depicted in government records. The impetus for such rulings is obvious. Cases where "survivor privacy" arises often are freighted with emotion, and it is difficult to fault the judicial instinct to shield innocents from emotional distress. However, courts have long resisted allowing claims based purely on emotional harm. Moreover, the potential emotional harm that might be caused by adhering to the language and intent of a statute is not a sufficient basis for this Court to create exemptions for family members or loved ones where Congress did not provide them.

This Court has the opportunity in this case to reaffirm FOIA's fundamental presumption that government records must be available to the public, and to revitalize the central idea that any exemptions must be both specifically drawn and narrowly construed.

This Court should rule that no such thing as "survivor privacy" exists under the federal Freedom of Information Act. To that end, this Court should affirm the decision of the Ninth Circuit ordering disclosure of four photographs, and reverse that court's decision to withhold six others.

Respectfully submitted,

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OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, NATIONAL PRESS CLUB, INVESTIGATIVE REPORTERS AND EDITORS, INC., AND NATIONAL FREEDOM OF INFORMATION COALITION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act exempts from disclosure records or information compiled for law enforcement purposes to the extent that such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The question presented is whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death.

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INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.[1] The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act ("FOIA") litigation since 1970.

The Reporters Committee was a party in two important FOIA cases previously heard and decided by this Court, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) – which is central to consideration of the issues presented by the case at hand – and *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). It also has been a party or *amicus* in hundreds of other FOIA cases litigated all over the country. In addition, the Reporters Committee has played a role in virtually every significant press freedom case that has come before this Court in the last thirty years – from *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), to *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) – as well as in many similar cases in both the federal and the state courts.

The Reporters Committee also provides direct assistance to more than 2,000 working journalists every year with respect to free-speech issues and information-access problems. In a similar vein, the Reporters Committee serves as a major national and international resource on free speech and the FOIA, authoring a number of handbooks on media law issues and disseminating information and advice in a variety of other forms.

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of over 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Association of Alternative Newsweeklies ("AAN") is the not-for-profit trade association for 123 alternative newspapers in North America. Member publications have a total weekly circulation of over 7 million and a reach of 17 million readers.

The National Press Club, established in 1908, is an organization of journalists and communicators in Washington,

D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.

Investigative Reporters and Editors, Inc. ("IRE") is a not-for-profit organization dedicated to improving the quality of investigative reporting within the field of journalism. Its more than 4,500 members work for the nation's leading broadcasters, cable operators, newspapers, magazines, and new media companies, and are directly engaged in the day-to-day practice of acquiring and disseminating news to the public. IRE provides a broad range of educational services and resources to reporters, editors, and others interested in investigative reporting and works to maintain high professional standards.

The National Freedom of Information Coalition ("NFOIC") is an umbrella organization that supports freedom-of-information coalitions in more than 30 states. Those coalitions work primarily to foster open government in their respective states but they also support citizens and organizations in disputes with the federal government on FOIA issues.

Amici curiae's interest in this case is in preserving public access to federal government records under the FOIA, 5 U.S.C. § 552, which generally requires disclosure upon request of records held by an agency of the federal government. This case raises the issue of the proper scope of section 7(C) of the FOIA, which creates a narrow exemption from disclosure for "records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)").

This Court's discussion of the language of Exemption 7(C) and of the proper test for application of that exemption may well have far-reaching implications for the future use of the

FOIA by journalists and writers, as well as by the general public. *Amici* therefore respectfully submit this brief in support of respondent.

SUMMARY OF ARGUMENT

The government claims that the photographs at issue in this case are shielded from FOIA disclosure under Exemption 7(C), which exempts records or information compiled for law enforcement purposes to the extent that such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy," and which requires a balancing of the public interest in disclosure against the countervailing interest in keeping the requested information private. The government takes an overly narrow view of the public interest and an overly expansive view of the privacy interest in the withheld photographs.

There is plainly a strong public interest in the photographs. They were an important part of a government investigation into the death of a public official who died in an unnatural (and public) manner while in possession of information involving ongoing investigations of high-level government officials. The photographs also were relied upon by the numerous government inquiries and reports that examined the conduct of the initial investigation and the circumstances of the death. The photographs therefore "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994) ("*FLRA*") (internal quotation marks omitted).

To evade this evident conclusion, the government attempts to minimize unduly the public interest in the photographs and, more generally, to limit the scope of permissible FOIA disclosure. The government focuses on the alleged personal interests of the FOIA requester in this case, but this focus is

improper: the identity of the requesting party has no bearing on the merits of the request, and there are other members of the public, including journalists and writers, with a strong interest in using the photographs to "shed light on" the government's activities. The government also urges this Court to graft onto the FOIA an extraordinarily restrictive test for determining the existence of a public interest where the asserted interest is in discovering government misconduct. But this new test, which would require the requester to come up with solid evidence of misconduct *in advance of* receiving the requested information and would entitle the government to internally "refute" the requester's theory *in advance of* any disclosure, is completely inconsistent with the FOIA. Further, the government contends that the public interest in this case is nonexistent because other material relating to the Foster death has been released and a number of official government investigations have been completed – but this contention ignores the independent significance of the records in question here, and gives the government a perverse incentive to disclose voluminous but irrelevant material in order to withhold a smoking gun.

In short, the government's public-interest arguments are meritless and should be rejected. There is plainly a public interest here in knowing what the government is up to. Indeed, given the use of the photographs in the various official inquiries into Foster's death, it is difficult to see how the government can plausibly take the position that the disputed photographs do not meaningfully advance this public interest. The FOIA reflects Congress's judgment that the public – not the government itself – is in the best position to engage in the full and searching scrutiny of agency conduct that is critical to the success of a representative government.

If the Court nevertheless concludes that there is no public interest in the photographs under existing law, it should reexamine its statement in *United States Department of Justice*

v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), that the public interest weighed under Exemption 7(C) is that of learning about the government's own activities. In amending the FOIA in 1996, Congress made clear that the *Reporters Committee* decision, which is not grounded in the language of Exemption 7(C), is overly narrow, and that records may properly be requested for any public or private purpose.

Finally, the government's analysis of the privacy interests at stake is as skewed as its public-interest analysis. Without question, the Foster family has suffered a terrible tragedy. Nevertheless, even assuming that Exemption 7(C) protects the privacy of third parties, the Foster family's privacy interests are minimal under the circumstances here. The Foster family's privacy already has been affected by the multiple government investigations and the prior release of massive amounts of information regarding the death. The release of several more photographs will create at most a marginal additional intrusion on their privacy, but could be the key to revealing the flaw in the government's investigations of the death. Under these circumstances, the strong public interest in release of the photographs outweighs any remaining privacy interest in keeping the photographs out of the public view.

ARGUMENT

I. There Is A Public Interest In The Release Of The Withheld Photographs

A. The Court of Appeals Correctly Found A Public Interest In Disclosure Of The Withheld Photographs

Exemption 7(C), the basis for the government's withholding here, requires a balancing of the public interest in disclosure against the countervailing interest in keeping the requested information private. There is clearly a weighty public interest in the photographs at issue in this case. No other

conclusion is consistent with this Court's precedent, with the FOIA's presumption in favor of disclosure, and with the underlying purposes that animate the FOIA.

This Court has repeatedly stated that the public interest advanced by the FOIA includes disclosure of information that "would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (alteration in original) (internal quotation marks omitted); *see also Reporters Comm.*, 489 U.S. at 773-75 (stating that the "core purpose of the FOIA" is contributing "significantly to public understanding of the operations or activities of the government" and "ensur[ing] that the Government's activities be opened to the sharp eye of public scrutiny" (internal quotation marks omitted)). The FOIA promotes the public interest in learning about government activities in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to "check against corruption and hold the governors accountable to the governed"); *Reporters Comm.*, 489 U.S. at 772-73 (explaining that a "democracy cannot function" unless the people have a right to disclosure of government information (internal quotation marks omitted)); H.R. Rep. No. 89-1497 (1966). This aspect of the FOIA is of particular importance to *amici*, because it is often investigators, journalists, and writers who obtain information through the FOIA that they then disseminate to the citizenry. As this Court has recognized, the news media have been "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

Because of the paramount importance of its protections, the FOIA embodies a general presumption in favor of

disclosure. *See, e.g.*, *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, as this Court has repeatedly emphasized, FOIA exemptions such as Exemption 7(C) are to be "narrowly construed." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (cautioning that the "mandate of the FOIA calls for broad disclosure of Government records" (internal quotation marks omitted)); *see also* 5 U.S.C. § 552(a)(4)(B) (stating that "the burden is on the agency to sustain its action" in withholding records).

There are multiple public interests at stake here: an interest in examining the suspicious circumstances of a government official's death, an interest in determining whether the initial government investigation of that death was properly carried out, and an interest in determining whether the subsequent government inquiries and the resulting reports were themselves proper and accurate. *See* Respondent's Br. at 18. These investigations and reports involved a matter of great public interest: the circumstances of the unnatural death of a high-level government official who, at the time of his death, possessed knowledge of the actions of other high-level government officials, including the President – actions that were then under serious scrutiny and a matter of major political controversy. The investigations and reports also relied in part upon the requested photographs, which are included in the government's official record but have nevertheless been kept from the public view.[2]

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[2] It is irrelevant that the Office of Independent Counsel, which has custody of the disputed photographs, was not involved at every stage of the government's activities relating to Foster's death. The public interest relevant to Exemption 7(C)'s balancing test includes the interest in monitoring not only the agency that possesses the data at issue, but also other agencies and even Congress. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 773 (discussing whether information requested would "shed any light on the conduct of any Government agency or official"); *id.* at 774 (inquiring whether information requested would reveal anything "about the character of [a] Congressman's behavior"); *FLRA*, 510 U.S. at 495-96.

Under these circumstances, the Ninth Circuit correctly found a strong public interest in the release of the withheld photographs. The photographs are being sought precisely to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (internal quotation marks omitted). As the Ninth Circuit recognized, "[t]he statute establishes a right to look, a right to speculate and argue again." *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1172-73 (9th Cir. 2000); *see also, e.g.*, *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) ("[T]he public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner."). The requested information is thus at the very heart of the public interest promoted by the FOIA.

B. The Government's Interpretation Of The Public Interest To Be Weighed Under Exemption 7(C) Is Inconsistent With Congress's Judgment, Reflected In The FOIA, That Disclosure Of Information In The Possession Of The Federal Government Is The Best Way To Ensure Governmental Accountability

The government attempts to minimize unduly the public interest at stake here and, more generally, to narrow the scope of permissible FOIA disclosure. *First*, the government improperly stresses the alleged personal interests of the FOIA requester in this case rather than the broader public interest in disclosure of the photographs. *Second*, the government urges this Court to adopt and apply a newly minted and highly

restrictive test for determining the existence of a public interest. *Third*, the government insists that the public interest in this case is diminished to the vanishing point because a mass of information relating to the Foster death has already been released and because a number of official government investigations have been undertaken. These arguments are meritless and should be rejected.

1. In arguing that there is no cognizable public interest at stake in this case, both the government and the Foster family emphasize the purported motives of Allan Favish, the FOIA requester, accusing him variously of being a conspiracy theorist, of having a "personal interest" in various "morbid matters," Gov't Br. at 35, of making a "ghoulish" request, Foster Br. at 9, of attempting to "feed his curiosity," Gov't Br. at 40, and of attempting to "supplement his own shadow investigation and to buttress his personal interpretation of the evidence," *id.* at 45-46. In short, both the government and the Foster family focus tightly on Favish's specific interest in using the information at issue in advancing his own cause, and pretend that no other public interest can possibly be at stake here.

This focus is an inappropriately limited one. It is well established that "the identity of the requesting party has no bearing on the merits of his or her FOIA request," *Reporters Comm.*, 489 U.S. at 771, and there are other members of the public with a strong interest in using the withheld photographs to "shed light on" the government's activities. *See id.* at 771-72 ("[W]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, . . . rather than on the particular purpose for which the document is being requested." (internal quotation marks omitted)). For instance, copies of the

photographs at issue in this case were previously (and unsuccessfully) requested by Accuracy in Media, a media watchdog organization. The role of journalists, writers, academics, researchers, historians, and other members of the public in monitoring and evaluating the federal government's conduct here – and in using the FOIA to gather information about the government's activities more generally – should not be overlooked or discounted. *See id.* at 772 (explaining that "[t]he Act's sole concern is with what must be made public or not made public" (internal quotation marks omitted)); *see also, e.g.*, *Stern*, 737 F.2d at 92.

2. The government insists that there is no public interest at all in the withheld photographs. To reach this conclusion, the government proposes a new test for cases in which the interest alleged is in ferreting out government illegality or misconduct. The government's test would require a FOIA requester in such a case to "identify new (as opposed to already refuted), credible, and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure." Gov't Br. at 38.

This test has no grounding in the text of the statute or the language of this Court's prior FOIA opinions; indeed, the government appears to have made it up out of whole cloth and designed it to foreclose the specific disclosure sought in the instant case. In addition, adoption of this test would have negative and far-reaching implications for FOIA requesters seeking all kinds of information as to which the government can plausibly assert the protection of Exemption 7(C) (or the closely related Exemption 6). On a number of grounds, this Court should decline the government's invitation to radically expand the scope of Exemption 7(C) and radically narrow the

scope of government disclosure of information under the FOIA.[3]

a. Although the government suggests that its proposed test has some basis in this Court's case law, *see* Gov't Br. at 34-38, that is simply not so.

The government places primary reliance on *United States Department of State v. Ray*, 502 U.S. 164 (1991), in which this Court addressed the strength of an asserted public interest in "ascertaining the veracity" of government interview reports with Haitian refugees, which the requester proposed to do by re-interviewing the refugees or otherwise using the requested records to obtain information outside of government files. *Id.* at 179. But, although the Court's decision noted that the asserted public interest, unsupported by a "scintilla of evidence," did not outweigh what it described as a "serious privacy interest," it left entirely open the question of "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure." *Id.* The Court therefore in no way decided that "new . . . , credible, and objectively reasonable evidence of misfeasance," Gov't Br. at 38 – let alone "clear evidence," a phrase that the government also employs in discussing its test, *id.* at 37-38 – is required in order to establish the existence of a public interest.

The government's other sources of Supreme Court authority are similarly indeterminate in this case. The government claims that several cases discussing a general presumption of legitimacy for government conduct support the view that only "clear evidence" can overcome the presumption.

[3] The Foster family argues in favor of an even stricter test that would require "compelling evidence" of "government malfeasance." Foster Br. at 14 (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991)). For the reasons discussed below with respect to the government's proposed test, this stricter test is infirm and should be rejected.

See Gov't Br. at 37-38. But the cases all arise in contexts radically different from the FOIA, which embodies a presumption in favor of disclosure and which applies in every case to information about government activities. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456 (1996) (interpreting Fed. R. Crim. P. 16 and addressing selective-prosecution claim); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (addressing validity of orders relating to patents made by Alien Property Custodian); *United States v. Nix*, 189 U.S. 199 (1903) (addressing statute allowing reimbursement of marshals' costs); *see also supra* at 7-8.

The government's reliance on *Armstrong* is particularly misplaced, and illustrates the basic fallacy of the government's attempt to translate these cases into the FOIA context. To be sure, *Armstrong* did decide that in order to "*prove* a selective-prosecution claim" a claimant must present "clear evidence" of discriminatory treatment. *Armstrong*, 517 U.S. at 464, 468 (emphasis added). But the Court settled on a quite different, and less stringent, standard as establishing the "requisite showing to establish entitlement to discovery": "some evidence tending to show the existence" of discrimination. *Id.* at 468-69; *see also id.* at 463-64, 468 (applying a presumption against discovery because discovery might "divert prosecutors' resources and . . . disclose the Government's prosecutorial strategy").

In a FOIA case, of course, the requester's immediate goal is not to establish liability or otherwise to *prove* anything. He is merely attempting to extract information from the government that will shed light on the government's activities, and that may or may not indicate a government coverup, or the success of some government policy, or an official's abuse of his position, or an agency's successful implementation of its mandate – all matters in which the public has an interest. As this Court has recognized, the hurdle for obtaining information

in the first instance cannot be so high as to permit only those with no need for the information to actually obtain it. *See generally United States Dep't of Justice v. Landano*, 508 U.S. 165, 176-77 (1993); *Rose*, 425 U.S. at 361 (discussing presumption in favor of disclosure). This Court has not adopted or even suggested endorsement of the government's proposed test.

b. The government's proposed test would create what is effectively an irrebuttable presumption against disclosure – the opposite of the disclosure-friendly presumption that the FOIA commands. Accordingly, the government's test is not only unsupported by this Court's FOIA precedent, but flies in the face of the basic principles established by that precedent and by the statute itself.

Under the government's approach, a FOIA requester would have to present "new (as opposed to already refuted)" evidence of government misconduct in order to establish even the most minimal public interest for purposes of an Exemption 7(C) analysis. Gov't Br. at 38. The government apparently believes that evidence has been "refuted" when it has been rejected by an official government body such as the Office of Independent Counsel – in other words, that the government can justify its refusal to turn over information on the sole ground that the government has previously announced that the information is not significant or probative. This approach is nonsensical. The government always has an incentive to protect itself from allegations of misconduct, and the purpose of the FOIA is to allow the public to see for itself what underlies the government's pronouncements.

Indeed, in light of the important use that has already been made of the photographs at issue by various official investigators in iterative investigations, the government's position cannot plausibly be that the withheld information does

not advance the public interest by shedding light on the government's activities. Rather, the government seeks a decision from this Court that allows an agency to choose who – if anyone – shines the light. But the FOIA rejects that scenario. Congress was well aware of the "[i]nnumerable times" that agencies had withheld information under prior law "only to cover up embarrassing mistakes or irregularities," S. Rep. No. 89-813, at 3 (1965), and chose to write a statute that opened government files to the public at large and made "disclosure, not secrecy, . . . the dominant objective," *Rose*, 425 U.S. at 360-61.

The government's proposed test would also require the FOIA requester to somehow advance "credible[] and objectively reasonable evidence of misfeasance before an allegation of governmental misconduct will rise to the level of a cognizable public interest in disclosure." Gov't Br. at 38; *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (requiring "compelling evidence"). But obvious "[c]onsiderations of 'fairness' . . . counsel against the Government's rule." *Landano*, 508 U.S. at 176. It will quite frequently be the case that the only material that would yield credible evidence of government misconduct is precisely the material that has been requested under the FOIA because it is locked away inside the government's own files. Thus, the requester will rarely be in a position to offer evidence that meets the government's criteria, and the government would then nearly always be able to shield requested information – and its own acts – from public view. *See id.* at 177 (rejecting the government's argument for exemption from disclosure for FBI criminal investigative sources and noting that "the requester . . . very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality").

As in *Landano*, therefore, the government's "proposed presumption, though rebuttable in theory, is in practice all but irrebuttable." *Id.* Indeed, this is illustrated by experience under the similar (although somewhat stricter) rule set forth by the D.C. Circuit in *SafeCard*, 926 F.2d 1197, which requires "compelling evidence that the agency denying the FOIA request is engaged in illegal activity" in order to establish a cognizable public interest. *Id.* at 1205-06. *SafeCard*, like the government's test here, creates a categorical rule based not on the type of record sought, as this Court has suggested might be proper, *see Reporters Comm.*, 489 U.S. at 778, but rather on the kind of public interest that has been asserted – an interest in exposing government misconduct. The *SafeCard* rule has been applied in a number of Circuits and has almost always resulted in withholding of the disputed information. *See, e.g., Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir. 2002); *Neely v. FBI*, 208 F.3d 461, 464-65 (4th Cir. 2000). Thus, the kind of categorical approach the government espouses is equivalent to a blanket exemption, not a balancing test. This is hardly consistent with the FOIA's mandate, as repeatedly explicated in this Court's opinions, which "calls for broad disclosure of Government records," and with the well-established rule that the exemptions are given a narrow construction. *CIA v. Sims*, 471 U.S. 159, 166 (1985). It also shifts the burden to the FOIA requester to justify the need for disclosure, in contravention of the statutory language placing the burden on the government to justify withholding of requested records. *See* 5 U.S.C. § 552(a)(4)(B).

Accordingly, the government's rule would turn the FOIA on its head, transforming a statute that is supposed to ensure disclosure subject to limited exceptions into a statute that, in a significant category of cases, ensures government secrecy and public ignorance. Such a rule, with consequences reaching far beyond the facts of this case, would prevent journalists from

exposing government waste or fraud; it would prevent writers and historians from exposing and anatomizing past government wrongdoing; it would prevent analysts from assessing the success or failure of the government's initiatives; and it would prevent the public in general from finding out what its government is up to. *See generally* H.R. Rep. No. 104-795, at 7 (1996) ("FOIA access to unpublished agency records has resulted in many disclosures of waste and fraud in the Federal Government . . . . Exposures resulting from FOIA disclosures, and the reactions they produce, are critical to maintaining a free society."). Neither the agencies nor the courts are "free to engraft that policy choice onto the statute that Congress passed." *Landano*, 508 U.S. at 180-81.

c. Moreover, it is important to recognize that this Court's public-interest standard encompasses far more than an interest merely in exposing government misconduct.

The government states that its proposed test is intended to apply "only when . . . the public interest asserted is an interest in exposing alleged missteps by governmental actors in the . . . execution of their duties." Gov't Br. at 38-39. But the Court of Appeals cases on which the government relies are not all limited in this way. Most notably, the D.C. Circuit's decision in *SafeCard*, which has been adopted by some other Circuits, can be read to presume that the *only* cognizable public interest that might weigh into the Exemption 7(C) balance is an interest in exposing government misconduct (assuming, that is, that the requester can come up with "compelling evidence" of that misconduct). *SafeCard*, 926 F.2d at 1205-06 ("[U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental

public interest in such information would ever be significant."); *see also* Gov't Br. at 34 n.19; Foster Br. at 14.

This Court should not adopt such a cramped view of the public interest as its general rule of decision – even though the public interest that respondent has asserted in *this* case can indeed be categorized as an interest in "exposing alleged missteps by governmental actors." Gov't Br. at 39. Ferreting out illegalities or missteps is only a small subset of the larger public interest in monitoring and assessing the government's conduct. Indeed, this Court has previously noted that broader assertions of public interest may be relevant, stating that "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Reporters Comm.*, 489 U.S. at 766 n.18. Limiting the public interest to discovery of governmental misconduct, or implying that such a limitation exists, would negatively affect a broad range of socially useful FOIA requests – requests for government data demonstrating the success or failure of a particular policy choice, for example – that fall well within the ambit of the *Reporters Committee* public-interest standard.

3. The government also suggests that the sheer mass of material about the Foster case that has already been released necessarily diminishes the public interest in the disclosure of the withheld photographs. This suggestion is deeply misguided. Mere release of information – even a great deal of it – relating to the same subject matter as a FOIA request does not necessarily, or even likely, indicate that the material covered by the request will not itself illumine the government's activities and policies. The issue is whether the record in question itself is meaningful, not whether there has been a voluminous disclosure of other records.

To be sure, as the government points out, courts have sometimes noted the existence of previously released

information in determining the applicability of Exemption 7(C). But in these cases the deciding factor is always the quality and significance of the undisclosed material. For instance, this Court's decision in *Ray*, upon which the government relies, describes the unredacted, already released portions of the documents at issue and discusses how the released information serves the public interest. *See Ray*, 502 U.S. at 178-79. But the decision to permit continued withholding of the redacted names of Haitian refugees turned not on the volume of the unredacted material, but rather on the fact that "the redacted identifying information" would not itself "shed any additional light on the Government's conduct of its obligation"; any public benefit depended on using the names to track down and interview the refugees, an enterprise that this Court found to be of dubious worth, and "[m]ere speculation about hypothetical public benefits" did not "outweigh [the] demonstrably significant invasion of privacy" involved in the record release. *Id.*

Nor is the government aided by the additional cases upon which it relies. *See* Gov't Br. at 42 n.25; *see also* Foster Br. at 21. In *Bast v. United States Department of Justice*, 665 F.2d 1251 (D.C. Cir. 1981), for example, the court found that some of the requested documents were protected from disclosure because they contained only "minor details of the FBI and Justice Department investigations" – but the court did release one portion of the materials with independent significance, despite the fact that a "substantial release of information" had already been made in the case. *Id.* at 1255-56 (releasing a section of an FBI report that suggested judicial bias because of the "public importance of judicial impartiality").[4]

[4] The other cited cases are similar, explaining that it is the public interest in the specific records requested that must be weighed in the balance and then evaluating the independent relevance or irrelevance of the specific information sought. *See, e.g.*, *Halloran v. Veterans Admin.*, 874 F.2d 315,

In this case, the materials sought are not merely names or minute details that are unrelated to the relevant public interest. Rather, they are pieces of additional, nonduplicative evidence that are capable, due to the angle from which they were taken or the area of the scene that they reveal, of bringing entirely new facts to light or of generating new and different evaluations of the evidence. And even if the photographs are inconclusive, or lead only to the conclusion that the official investigations reached the correct judgment about the circumstances of Foster's death, the disclosed records will have contributed significantly to the public's understanding of the government's activities.[5]

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324 (5th Cir. 1989) (explaining that disclosure of redacted names "will add little to the public's understanding" but stating that "[w]e do not mean to belittle the fact that redactions – particularly of names and identifying information – may nonetheless impede knowledge and understanding of the government's actions"); *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148, 1153 (7th Cir. 1987) (determining that the specific material sought simply would not contribute to public debate); *Stone v. FBI*, 727 F. Supp. 662, 667-68 (D.D.C. 1990) (stating that the redacted names of law enforcement officers would not "be anything other than an insignificant detail in terms of the public interest" and that the benefits from interviewing those officers were purely speculative), *aff'd*, No. 90-5064, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

[5] The government somewhat inexplicably contends that the proposed use of the photographs is nothing more than a derivative one because "the photographs themselves reveal nothing directly about the Office of Independent Counsel's activities." Gov't Br. at 45-46 & n.26. But there is no call in this case for this Court to address whether derivative use is ever permissible, a question that this Court has previously left open and as to which the Circuits are in disagreement. *See Ray*, 502 U.S. at 179; *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994, 998 (10th Cir. 1995); *see also* Gov't Br. at 46 (erroneously suggesting that this Court's *FLRA* decision, which was based on the conclusion that there was no public interest in the requested materials and the interaction between the FOIA and the labor laws, *see FLRA*, 510 U.S. at 497-98, stated that derivative use was not proper). Here, there is no necessity for an extra

In fact, although the government cites the number of official investigations of Foster's death as evidence that there is nothing more to be discovered here, the obviously felt need to repeatedly investigate and re-investigate the Foster case actually leads to quite the opposite conclusion – that there has been a level of suspicion on the part of even government officials that the whole truth has not been uncovered, and that something further remains to be ferreted out. *See* Gov't Br. at 35-36 ("[E]ach subsequent investigation was undertaken for the express purpose of addressing and resolving doubts that had been posited both about Foster's death and the predecessor inquiries."); *see also id.* at 45 (noting continuing public interest in Foster death as reflected in published books and websites). Respondent's exhaustive discussion of the various inconsistencies in the existing investigative reports helps to demonstrate why that suspicion is justified. *See* Respondent's Br. at 18-40.

In addition, according the sheer tonnage of already-released information, great weight in the 7(C) public-interest analysis, as the government proposes, would give the government a very perverse incentive indeed – to release large quantities of relevant (or even not particularly relevant) information while holding back the most embarrassing or damaging material. This scenario is not a far-fetched one, especially in a case that is premised on the existence of some government wrongdoing or coverup in the first instance. After all, the FOIA was enacted – replacing a statute that exempted

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step or resort to additional sources of information in order for the photographs to advance the public interest; the photographs themselves are likely to shed light on whether or not the Office of Independent Counsel and other federal government actors have adequately investigated the Foster death. *See supra* note 2 (explaining that requested records need not shed light on the specific activities of the agency that happens to be the record custodian).

from disclosure "any matter relating solely to the internal management of an agency," *Rose*, 425 U.S. at 362 (quoting 5 U.S.C. § 1002 (1964 ed.)) – in recognition of the fact that government agencies are naturally inclined to be protective of the information within their possession and to release it only under a certain amount of legal duress. *See EPA v. Mink*, 410 U.S. 73, 80 (1973) (stating that the FOIA "attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"); *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (acknowledging "the understandable reluctance of government agencies to part with [requested] information" due to their "institutional interests"), *rev'd on other grounds*, 489 U.S. 749 (1989); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 259 (D.C. Cir. 1977); H.R. Rep. No. 92-1419, at 8-10 (1972).

Indeed, the government's argument would resurrect a problem analogous to that resolved by Congress in favor of the requester in its 1974 amendment to Exemption 7. Congress was concerned that the original language of Exemption 7, which allowed withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party," was resulting in "[e]vasional commingling" – *i.e.*, the placement of "otherwise nonexempt materials with exempt materials in a law enforcement investigatory file" in order to "claim protection from disclosure for all the contents." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155-57 (1989) (quoting Pub. L. 89-487, § 3(e)(7), 80 Stat. 251) (internal quotation marks omitted). Congress thus amended Exemption 7 to "require[] the Government to demonstrate that a record is 'compiled for law enforcement purposes' and that disclosure would effectuate one or more of . . . six specified harms." *Id.*

Here, the government seeks permission from this Court to engage in evasional document release – the release of nonexempt materials that may be innocuous, duplicative, or only tangentially relevant to the request in order to claim protection from disclosure of whatever small number of records have been withheld, regardless of those documents' independent significance in serving the public interest. This standard would be inconsistent with Congress's intent and with the purpose of the FOIA, and this Court should not adopt it. Rather, the withheld records in this case should be independently assessed in order to determine whether they contribute to the public's understanding of the government's activities regarding Foster's death. *Cf. United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

* * *

In the end, it is plain that there is a public interest in this case in the release of the withheld photographs. Whatever the ultimate results of the Exemption 7(C) balancing process, this Court should recognize the existence of that public interest in knowing what the government is up to and should reject the government's attempt to create an insurmountable public interest hurdle.

C. If The Court Does Not Find A Public Interest Under Existing Law, The Court Should Revisit Its *Reporters Committee* "Public Interest" Standard In Light Of The 1996 Amendments To The FOIA

If the Court does not find a cognizable public interest in this case under existing law despite the clear significance of the withheld photographs in shedding light on the government's activities, the Court should revisit *Reporters Committee*'s

articulation of the "public interest" standard in light of recent congressional action that this Court has not previously considered. In 1996, Congress amended the FOIA by enacting the Electronic Freedom of Information Act ("EFOIA"). *See* Pub. L. No. 104-231, § 3, 110 Stat. 3048 (1996) (amending 5 U.S.C. § 552). Through this amendment, Congress made clear that the public-purpose inquiry set forth in *Reporters Committee*, which asks only whether the requested information would shed light on the government's activities, is overly narrow. These views of a subsequent Congress on the meaning of the earlier-enacted Exemption 7(C) have persuasive force. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 784-86 (1983). If necessary, therefore, the Court should clarify that the relevant public interest under the FOIA encompasses other types of government information in which the public has a legitimate interest.

In the "Findings and Purposes" section of the EFOIA, Congress found:

> [T]he purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for *any public or private purpose.*

Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (emphasis added). As this Court has repeatedly made clear, such Congressional findings and purposes in the text of a statute are entitled to interpretative weight. *See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002); *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

Moreover, as the sponsor of the legislation explained in an accompanying Senate Report, this language was intended to express the view that "[t]he reasoning of the Supreme Court in *Department of Justice v. Reporters Committee* and the *United States Department of Defense v. Federal Labor Relations Authority* analyzed the purpose of the FOIA too narrowly. The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government." S. Rep. No. 104-272, at 23-32 (1996) ("Additional Views of Senator Leahy") (footnote omitted). The *Reporters Committee* decision and subsequent "[e]fforts by the courts to articulate a 'central purpose' for which information should be released," the sponsor stated, "impose[] a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness." *Id.*; *see also* Patrick J. Leahy, *The Electronic FOIA Amendments of 1996: Reformatting the FOIA for On-Line Access*, 50 Admin. L. Rev. 339, 340 (1998). These clearly expressed views of the sponsor of the EFOIA legislation are entitled to particular weight. *See, e.g., North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *Will EFOIA Amendments Affect Reporters Committee?*, 22 Access Reports: Freedom of Information 1, 2-3 (Oct. 9, 1996).

In criticizing *Reporters Committee* and discussing the purpose of the language in the "Findings" section of the legislation, the sponsor cited and relied upon the analysis in Justice Ginsburg's concurring opinion in *FLRA*, which acceded to the precedential force of *Reporters Committee* while disagreeing with its analysis. *FLRA*, 510 U.S. at 507-508 (Ginsburg, J., concurring). As Justice Ginsburg explained:

> The *Reporters Committee* "core purpose" limitation is not found in FOIA's language. A FOIA requester need not

> show in the first instance that disclosure would serve any public purpose, let alone a "core purpose" of "open[ing] agency action to the light of public scrutiny" or advancing "public understanding of the operations or activities of the government." Instead, "[a]n agency must disclose agency records to any person . . . 'unless [the records] may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).'"

Id. (citations omitted) (alteration in original).

Indeed, as Congress plainly recognized in 1996, the *Reporters Committee* limitation may be interpreted in such a way as to keep from public view a wide variety of important public records, contrary to the basic purposes for which the FOIA was enacted. For instance, "Federal Aviation Administration airline maintenance records, results of Food and Drug Administration clinical trials . . . [, or] economic data compiled by the Department of Commerce" all shed light on matters of public interest but may be found by courts not to shed direct light on government activities. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 Admin. L. Rev. 984, 990 (2002); *see also* S. Rep. No. 104-272, at 2 (1996), and H.R. Rep. No. 104-795, at 2 (1996) (stating that the FOIA "has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards"). The *Reporters Committee* standard may therefore potentially block access to many government records that happen to contain individuals' names or other personal information – and "[w]hen the public can learn nothing about how government affects or is affected by individuals, it can learn very little from its FOI[A] requests." *Electronic Freedom of Information Act of 1996: Hearings Before the Subcomm. on Gov't Mgmt., Info. & Tech. of the House Comm. on Gov't Reform & Oversight*, 105th Cong.

(June 9, 1998) (testimony of Jane E. Kirtley, then-Executive Director of the Reporters Committee for Freedom of the Press) (discussing effect of EFOIA findings and explaining limitations *Reporters Committee* standard places on investigative journalism), *available at* www.rcfp.org/news/documents/efoia_testimony.html.

Accordingly, in light of the 1996 EFOIA and concerns raised by Justice Ginsburg and others, the Court should – assuming that it does not find an adequate public interest in this case under current law – revisit and reform the "central purpose" test set forth in *Reporters Committee*, which is not grounded in the language of the FOIA and is inconsistent with the statute's important goals. This Court should make clear the FOIA encompasses information requested for *any* public or private purpose, including a purpose distinct from "shed[ding] light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773.

II. Any Applicable Privacy Interests In The Withheld Photographs Are Entitled To Only Limited Weight

The government not only unduly minimizes the public interest at stake in this case; it also gives undue weight to the relevant privacy interests. It is undeniable that the Foster family has experienced a tragic loss, and that the publicity surrounding Foster's death has magnified their suffering. However, even assuming that Foster's family members have any statutorily cognizable privacy interest in the photographs at issue in this case – a proposition that is far from certain – that interest is diminished by the extensive release of information about his death that has already taken place, as well as by his status as a high-level government official whose unnatural death occurred at a time when he had knowledge of important political matters.

As the government points out, this is a case in which the Foster family has already been subjected to a great deal of probing and publicity about the death of their loved one. There have been numerous official investigations, countless stories in the news media, several books published, and a number of websites devoted to discussing the controversy over the death and the resulting government inquiries. These public discussions of the Foster death have been fed by official reports, along with government disclosure of thousands of pages of evidence and more than one hundred photographs associated with the death. *See, e.g.*, Gov't Br. at 15, 41-42, 49-50. One of the photographs at issue here – a picture of Foster's hand holding a gun – has already been published by *Time* magazine. *See id.* at 8. This kind of publicity – and a strong public interest in the case – is ongoing; the websites remain active, the books are in print, and the government reports are available for general consumption.

In these circumstances, any zone of privacy around the Foster family with respect to the death has already been irreversibly invaded, and the release of a handful of additional photographs will not impose meaningful additional harm under Exemption 7(C). *See, e.g.*, *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 865 & n.22 (D.C. Cir. 1981); *Grove v. CIA*, 752 F. Supp. 28, 32 (D.D.C. 1990). *Compare, e.g.*, *Reporters Comm.*, 489 U.S. at 763-64 (explaining that information that was already in the public record was cloaked in "practical obscurity" and thus did not diminish privacy interest); *FLRA*, 510 U.S. at 500-01 (finding at least some privacy interest in list of home addresses where it was possible that some of the addresses might "be available to the public in some form"); *Bast*, 665 F.2d at 1254-55 (stating that prior "journalistic speculation" does not diminish privacy interest and that in such a case renewed publicity with

"imprimatur of an official investigation" can harm privacy interest).[6]

The Foster family's privacy interest is also diminished by Foster's particular circumstances. Not only was Foster a high-level government official, but he died in an unnatural (and very public) manner at a time in which he was embroiled in a high-profile political controversy. Foster's own privacy interests were clearly lessened under these circumstances, although not entirely erased. *See, e.g.*, *Quinon v. FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996); *Fund for Constitutional Gov't*, 656 F.2d at 865 & n.22; *Common Cause v. National Archives & Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980). To the extent that his family's interests are based solely on disclosures about Foster, their interests are similarly diminished; they can have had no expectation that Foster would be free from highly public scrutiny, and therefore they necessarily sacrificed some of their own privacy as to disclosures *about him* when he took up his Deputy Counsel position. And, contrary to the government's assertion, *see* Gov't Br. at 21 n.10, it is possible that release of the photographs at issue would actually have the result of quieting or even settling the ongoing controversy about Foster's death, thus increasing the family's privacy over the long term.

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[6] In particular, there can be no privacy interest to speak of in the requested photograph that has already been published in a national magazine. Although the government, if indeed it was not responsible for the release of this photograph in the first instance, may not have formally waived its Exemption 7(C) arguments with respect to the photograph, re-release of the photograph can cause no conceivable harm to the Foster family. Anyone with an interest in seeing the photograph, in publishing it in a medium in which the Foster family might see it again, or in using it as the basis to ask the family questions or write about Foster's death, can do all of those things now using the copy that has already received wide circulation. In addition, the photograph does not appear to be in any way graphic or lurid.

Most importantly, the multiple government inquiries and the massive amount of previously released information diminish the Foster family's privacy interest but in no way reduce the public interest in disclosure of the withheld photographs. Each photograph here can individually contribute to the advancement of the public interest; indeed, one of the photographs may be a smoking gun that strongly demonstrates the government's misconduct or proves the government's good faith. On the other hand, given the tremendous amount of intimate detail about Foster and his death that already has been made public, the impact on the Foster family's privacy of the release of additional photographs is muted.

In short, although the Foster family has undoubtedly endured terrible suffering, under the circumstances here, the powerful public interest in release of the photographs outweighs any privacy interest that may be at stake.

CONCLUSION

The portion of the judgment below ordering release of the photographs should be affirmed.

Respectfully submitted,

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